No. 15244

United States Court of Appeals

for the Ninth Circuit

JOHNSON LINE, a Corporation,

Appellant,

vs.

SHAUN MALONEY,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-14-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Western District of Washington, Northern Division

No. 3678

SHAUN MALONEY,

Plaintiff,

vs.

JOHNSON LINE, a Corporation,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant, complains and alleges as follows, to wit:

I.

That at all times herein mentioned plaintiff was, and is now, a resident of Seattle, King County, Washington, said place being in and within the Territorial confines over which the above-entitled Court has jurisdiction.

II.

That at all times herein mentioned, the Johnson Line, a foreign corporation, is doing business, and has a place of business in Seattle, King County, Washington, and was the owner and operator of the steamship, Golden Gate, and at all times mentioned in this complaint, said vessel was employed as a merchant vessel in navigable waters, at Seattle, Washington.

III.

That prior to the 28th day of June, 1953, the defendant entered into a contract with the W. R. Grace Company, said Company agreeing to act, and acting at all times mentioned in this complaint, as an independent contractor, having complete control and supervision of all operations pertaining to the loading and discharge of cargo from said defendant vessel, Golden Gate, in the Port of Seattle, in the navigable waters of Puget Sound, at Seattle, Washington.

IV.

That as an independent contractor, the W. R. Grace Company, hired the plaintiff, Shaun Maloney, as a stevedore and entered upon the performance of said contract, and the plaintiff, at all times herein mentioned, acted under the orders of the W. R. Grace Company, in its capacity as an independent contractor or employer, and not as an agent of said vessel and its said owners and operators.

V.

That plaintiff has elected to recover damages against a third person, other than his employer, to wit: Said defendant, and is entitled to sue here under Section 933 of Title 33, U. S. C. A., and amendments thereto, and plaintiff has notified the Commissioner of this District, administering the Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. A., 901 et seq., of said election.

VI.

That on or about the 28th day of June, 1953, at about the hour of 8:30 a.m., plaintiff was obliged in the course of his employment to descend to the tween deck of the No. 7 hatch of said vessel, the Golden Gate; that while plaintiff was so engaged, he was suddenly and violently precipitated to the surface of said tween deck, grievously injuring him, as more fully hereinafter set out.

VII.

That the proximate cause of plaintiff's injuries and damages was the unseaworthiness of said vessel with respect to said tween deck, the failure to provide plaintiff with a safe place in which to work, and the careless and negligent manner in which said tween deck was maintained in that its surface was littered with debris and with numerous loose grains of wheat which caused plaintiff to slip, fall and injure himself as aforesaid; that said defective and unsafe condition was the proximate cause of plaintiff's injuries and damages, and that said condition was known, or should have been known by the defendant, its agents, servants and employees, in the exercise of reasonable and ordinary care.

VIII.

That as a proximate result of the unseaworthiness of the vessel and the failure to provide plaintiff with a safe place in which to work, and of the negligence of the defendant, its agents, servants and employees, plaintiff sustained a severe nervous shock, great pain and suffering; that he sustained

severe and permanent injuries to his right wrist; that by reason of said injuries, he has been permanently disabled in the exercise of his occupation as a longshoreman; that plaintiff is obliged to incur expenses for medical care and treatment; that he has lost wages, and will continue to lose wages; that prior to the time of receiving said injuries, plaintiff was an able-bodied man of the age of 41 years, and free from said injuries and infirmaties set out; that by reason of the foregoing, plaintiff has been damaged in the sum of $75,000.00.

Wherefore, Plaintiff prays for judgment against the defendant in the sum of $75,000.00, together with his costs and disbursements herein to be taxed.

ZABEL & POTH,

By /s/ PHILIP J. POTH,
Attorneys for Plaintiff.

[Endorsed]: Filed April 2, 1954.

[Title of District Court and Cause.]

ANSWER

Comes Now the the defendant and for answer to the cause of action stated in plaintiff's complaint herein admits, denies and alleges as follows, to wit:

I.

Defendant admits the allegations contained in paragraphs I, II and III of plaintiff's complaint.

II.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of the compaint, and therefore denies the same.

III.

Defendant admits the allegations contained in paragraph V of the complaint.

IV.

Defendant denies the allegations contained in paragraphs VI, VII and VIII of the complaint.

First Affirmative Defense

For further answer and by way of First affirmative Defense to plaintiff's complaint defendant alleges as follows:

I.

That if the plaintiff sustained any injuries or damages by reason of the accident as alleged and set forth in the complaint, or at all, such injuries and damages were proximately caused and contributed to by the negligence of the plaintiff himself, in that he failed to exercise reasonable care, and use ordinary caution for his own safety while descending to and walking on the surface of the tween deck of the SS "Golden Gate."

Wherefore, having fully answered plaintiff's complaint, defendant prays that the said complaint be dismissed with prejudice and that the court discharge the defendant from all liability to the plain-

tiff herein award to the defendant its costs and attorney's fees against said plaintiff.

BOGLE, BOGLE & GATES,
Attorneys for Defendant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 12, 1954.

[Title of District Court and Cause.]

PLAINTIFF'S REPLY TO DEFENDANT'S ANSWER

On the morning of June 28, 1953, plaintiff, Shaun Maloney, was ordered, along with his co-employees, to uncover No. 7 hatch of the vessel Golden Gate at its weather deck level. The men were further ordered and directed to descend to the tween deck and there to discharge general cargo from the vessel. Defendant states that a considerable amount of the hatch was uncovered and that daylight was allowed to flow on to the deck below.

Plaintiff has never contended that poor or improper lighting was the cause of plaintiff's injuries. The existing, unsafe condition at the time of plaintiff's injuries was the accumulation of slippery wheat dust and kernels. This condition had been allowed to be maintained by the defendant's agents, servants and employees. From the weather deck it did not appear that there was anything exceptionally wrong on the tween deck level (p. 14, lines 15,

16). To all outward appearances the deck below at the tween deck level was apparently safe to plaintiff. From his observation point on the main deck he was looking directly down into the hatch from a distance of approximately 20 feet (p. 28, line 17). Wheat dust by its very nature being transparent, could hardly be deemed to be visible to the plaintiff from his perspective at the weather deck level.

Plaintiff had taken but a step or two away from the ladder at the time that he fell because of the slippery wheat dust and kernels. His back would necessarily have to be to the hold as he was descending the ladder and he could not possibly be aware of the existing condition. Plaintiff had no knowledge of any unsafe condition (p. 29, line 28). Plaintiff was the first man down * * * into the hatch after the hold was uncovered (p. 29, line 25). Prior to the time of the accident plaintiff was not aware that the vessel had been loading wheat. The hatch at the weather deck level simply was in a condition for sea (p. 11, lines 29, 30), and the hatch was covered (p. 11, line 25), and without warning plaintiff would have no notice of the existing condition below deck. Plaintiff states that the cause of the accident was due to the dust mostly (p. 30, line 6), and not the actual wheat kernels, although the kernels of wheat were quite liberally scattered all over the hatch (p. 13, lines 27, 28).

Mr. Dibble, Super Cargo for the vessel, stated that he had no recollection of the stevedores cleaning No. 7 hatch while the vessel was in Seattle. In

fact, he could not recollect whether or not the hatch had been actually cleaned in Tacoma (p. 43, line 13). Mr. Patterson, Stevedore Foreman, stated that at the time of the trial he did not remember having observed the stevedores working in No. 7 hatch cleaning up the tween deck (p. 46, line 4). Whether it was actually cleaned is better determined by the testimony of Mr. Hearst (p. 5, line 12), who said it took at least an hour or more to clean up the ship so that it would be safe to work. This cleaning operation is usually looked after by the ship's personnel, Mr. Patterson, defendant's own witness, stating that the ship's personnel keeps their decks clear as a rule (p. 46, lines 27, 28).

Mr. Patterson testified that he was engaged in unloading heavy lift tanks on another hatch and was practically engaged there on that particular hatch all the time (p. 46, lines 16, 17, 18). Mr. Patterson had simply ordered and directed the stevedores to uncover and discharge from the tween decks at No. 7 hatch. He was not aware of the unsafe condition, not having been in that vicinity during the discharging operation. His first notice of the dirty condition was the report made to him by plaintiff after he had been injured while endeavoring to carry out his orders. He also distinctly remembered the plaintiff being injured and the cause of the plaintiff's injuries.

Mr. Dibble had no recollection of being around or looking down into No. 7 hatch on the Golden Gate on April 28, 1953 (p. 41, line 12). The testi-

mony regarding the cleanup work done at Tacoma prior to the vessel's travel to Seattle does not show that the vessel actually did undergo cleaning at No. 7 hatch at the tween deck level. Mr. Dibble did not remember having ever examined that hatch (p. 43, line 1).

Mr. Patterson testified that the ship's personnel has a duty of keeping the decks of the vessel clear as a rule (p. 46, lines 24-28). The duty to keep the vessel's decks clear carries with it the implied duty of examination and investigation to determine whether or not those decks have been properly maintained. The vessel's personnel, namely, the officers and servants, have the express duty to provide the stevedore invitee with a safe place in which to work and a seaworthy vessel. The shipowner has a "nondelegable duty" to so provide. Lahde vs. Soc. Armadora Del Norte, 220 F. (2nd) 357. The defendant's officers, agents and servants were the only ones in the position of determining whether or not the plaintiff and his co-employees would be provided with a safe place in which to work, and obviously there existed ample time for them to examine the vessel's decks for defective conditions about which the plaintiff would be obliged to carry out his duties. The wheat had been loaded in Tacoma, Washington (p. 42, line 4). Whether or not the vessel's hold after the loading operation was properly cleaned was never determined by the testimony of the defendant's own witnesses. In fact, whether anyone cleaned the hold at all could not be recollected by the Super Cargo, Mr. Dibble (p. 42, line

16). The defendant could never relinquish the control of the vessel as to the maintenance of said vessel to the stevedores employed by the defendant in Tacoma. They had the absolute duty to see to it that the vessel was in a safe and seaworthy condition, particularly as to stevedore invitees, who would board the vessel and perform the cargo operation.

In The Joshua W. Rhodes, 529 Fed. 604, it clearly defines the law regarding the responsibility of the vessel owner to furnish a proper and reasonably safe passway for the plaintiff's use in the performance of his work. Even though plaintiff may have been able to perceive the dust and wheat kernels on the deck had he more closely examined the deck, he cannot be held negligent for assuming the deck and passway would be safe for him to pursue his duties.

The condition which caused plaintiff's injury was admittedly dangerous. Defendant contends that the officers and crew of a vessel must have actual notice of the existence of a dangerous condition. This contention is not the law of our jurisdiction. On Monday, October 10, 1955, the Supreme Court of the United States denied certiorari in the Lahde case (supra) which arose in this jurisdiction. In that case the longshoreman went aboard a vessel for the first time and went down into the hatch where he was injured by a dangerous condition, as was the plaintiff in this case. The Ninth Circuit Court of Appeals held that the ship was liable, whether or

not anyone knew of the existence of the dangerous condition at the time of the injury. The Supreme Court upheld the decision of the Circuit Court. Insofar as the requirement of actual or constructive notice is concerned, the defendant, its agents, officers and servants were in the position to know of the danger and likewise were in the superior position to guard against the admittedly hazardous condition. The defendent contends that the plaintiff's employer was negligent in sending plaintiff into the area where the defective condition existed. Plaintiff and his employer are charged only with the care of a reasonably prudent man. They could assume as invitees on board the vessel that the vessel would provide them with a safe place in which to work, free from defects and in a seaworthy condition. That duty to so provide cannot be relinquished by the vessel and its owners.

The testimony of the defendant's doctor, due to its confused nature, cannot be given credence insofar as his medical conclusions are concerned. His actions in furnishing treatment over a long period of time clearly contradict his testimony on lack of symptoms. His answers were also very evasive and he in no way exhibited a frank attitude in his response to direct questions. Further, he convicted himself of running up charges for a long period of time in treatment of a patient with whom he said he could find nothing wrong.

He says that when he first saw Mr. Maloney, there were no findings of any trouble (p. 49, line

23). However, instead of sending him away, he put his wrist in a splint and prescribed X-ray treatments (p. 49, line 29; p. 50, line 1). He then continued to see him and treat him. He had him in the splint from January 11, 1954 (p. 49, line 13), and told him not to work until February 23, 1954 (p. 51, line 28); he had him wear the splint thereafter and continued to see and treat him regularly. This treatment consisted of cortisone (very expensive) (p. 62, line 29) and X-ray (p. 55, line 15). When asked why he gave cortisone (p. 62, line 30), the vague, ambiguous and evasive nature of his testimony is clearly revealed:

"Q. Why did you give him cortisone?

"A. Because cortisone has relieved discomfort in the wrist.

"Q. Discomfort from what?

"A. From anything."

The only clear, frank, cogent, expert testimony in the medical part of the record is that elected from Dr. Gray, who gave plaintiff a permanent disability of the wrist as caused by his accident.

The plaintiff's statement of his present wage loss, due to his injury in the amount of $2,300, is in no way contradicted. His 1952 earnings as cited by defendant have been adequately explained (p. 38, line 6). In that year he was not a fully registered longshoreman entitled to full work opportunity. He was merely working extra and obtaining the leavings after the employers had dispatched the regular men to work.

Plaintiff having been trained for no other work than that of hard and arduous labor, is destined to continue his chosen field with a decided disability. He has lost considerable time and employment to date because of his injury, and the future outlook as to the restoration of his full capabilities is unfavorable at this time. Plaintiff reiterates his arguments with full intensity referring to pages 5 and 6 of plaintiff's opening argument.

Because of the unsafe place in which plaintiff was obliged to carry out his duties, the negligence and carelessness of the defendant's agents, officers and servants in improperly maintaining the vessel's decks, and which negligence was the proximate cause of plaintiff's injuries, together with the fact that the vessel was unseaworthy, plaintiff sustained injuries compensable only in damages at a fair and reasonable value as follows:

Pain and suffering at $500 per annum	$14,415.00
Past wage loss (2 years)	2,300.00
Future wage loss (26.43 years) at $1,000 per annum	26,430.00
Total	043,145.00

Respectfully submitted,

ZABEL & POTH,

By /s/ PHILIP J. POTH,
Attorneys for Plaintiff.

Receipt of copy acknowledged.
[Endorsed]: Filed October 12, 1955.

United States District Court, Western District of Washington, Northern Division

No. 3678

SHAUN MALONEY,

Plaintiff,

vs.

JOHNSON LINE, a Corporation,

Defendant.

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the morning of June 28, 1953, plaintiff, Shaun Maloney, in the course of his employment as a stevedore, was ordered along with others to uncover No. 7 hatch of the vessel Golden Gate and to descend to the 'tween-deck and there to discharge cargo from the vessel. He was the first to descend and after taking a step or two from the ladder, plaintiff slipped and fell, thereby injuring the wrist of his right hand, as will hereinafter appear. After the injury he continued his work on the ship.

Plaintiff received physical therapy treatments from Dr. Smith and was on December 28, 1953, examined by Dr. Bernard Gray, a well-qualified physician and surgeon specializing in orthopedic and traumatic surgery. In response to an inquiry as to what his examination disclosed, Dr. Gray testified:

"He [plaintiff] told me that he had been hurt six months previously on June 28, 1953. He was a

longshoreman aboard a vessel and he stated that he slipped on some wheat apparently and in order to catch himself—or, he caught himself on his wrist and in so doing he hyperextended or bent his wrist backward rather forcefully. He said that he had immediate pain and his wrist became very painful and swollen by the next day. He consulted his doctor, Dr. Smith, who put him on treatment at that time.

"He had no time loss and he states that he favored his wrist for a couple of months and it tended to improve for a while and then got worse. He said he had never hurt his wrist before. He was right handed. At the time I first saw him I noted that as far as examination was concerned, there was ten degrees limitation of motion forward and backward at the wrist. That the grasping power of the hand was weak and there was some swelling at the top of the wrist and the circumference of the wrist was three-eighths of an inch greater than the left. I made some X-rays at the time which revealed nothing significant. I advised that he wear a leather cuff, a so-called Colles cuff, which would immobilize the wrist and take the load off of it. I suggested he come back and see me in about ten days and that was the last I saw of him until a few days ago."

In response to the inquiry, "What did you find on this examination?" Dr. Gray continued:

"I saw him August 1, 1955. He told me that after I had seen him he had been seen again by his doctor

who immobilized the wrist in plaster for a few weeks and advised surgery to the wrist. He was then sent to Dr. Morris Dirstine who examined him and recommended X-ray treatment and applied the cuff which had been recommended. At that time he was off work for an interval. X-ray treatment did not contribute much to his relief. He had been working since that time, most of the time doing lighter work. At the time I saw him he was driving a bull. [A small truck used to lift loads.] If his work would tend to be heavy he wore his cuff. He had certain residual complaints with reference to the right wrist. He had pain in lifting, especially if the hand was in hyperextension, with the wrist bent backwards. Any exertion caused pain and tended to persist for variable lengths of time. The swelling or lump he had at the back of the right wrist would blow up at times and quieten down at times, but there always was some swelling there and the only relief he could get was if he did not exercise his wrist or if he wore his cuff. At the time I examined him I thought that the range of motion was the same as before. There was some limitation of motion, ten degrees, which can be estimated as equivalent to about fifteen per cent. There was a small ganglion or lump at the back of the right wrist which was tender and which could be made to enlarge by bending the hand down. There was slight weakness of grip in the hand, but this was not marked. There was pain on forced motion of the wrist. This is about the extent of the findings on ex-

amination. I took new X-rays which showed no change and nothing significant.

"* * *

"Oh, I think that he has got a stationary condition, or, the basis of the condition is stationary. I think that with over-exertion he will have aggravation. I think he will probably end up having surgery on this wrist and an attempt made to remove this ganglion.

"* * *

"If removal of the ganglion is successful I think he will have some improvement. If it is not successful, or if it will recur, his condition will be the same. I think the stiffness of the wrist, whatever degree of limitation of motion he has, will be permanent, whether the ganglion is removed or not. I think if he did light work for a long period of time the tendency would be that he would feel pretty good, but when he went back to heavy work he would have some trouble in his wrist again."

And further the Doctor testified:

"Oh, I think the function of his right wrist has been limited and will be limited. If I was going to estimate the degree of permanent disability, I would estimate it at between fifteen and twenty per cent of the loss of the hand at the wrist."

The plaintiff, a forthright and fair witness, testified that his calculated loss of time as as result of the injury was 184 days representing a loss of about $2,300 in wages. As we have seen, this loss of time

occurred after December 28, 1953, the day of his first visit to Dr. Gray. It is evident that after the injury he carried on his work with pain and discomfort and that he will continue to suffer pain in the performance of work involving the use of his wrist.

At the time of the injury, June 28, 1953, plaintiff was 41 years of age and in sound health. He had been a longshoreman for 5 years prior to his injury, June 28, 1953, and for 10 years before his experience as longshoreman, he had been a sailor in the Merchant Marine. The testimony does not disclose that he has had training qualifying him to earn his living other than by means of physical toil.

From the cross-examination of plaintiff we learn that he earned as a longshoreman in the year 1952, $2,383.32; in 1953, $4,663.28; and in 1954, $2,988.32. His job opportunity was not as good in 1952 as it was in 1953 and subsequently. This he explained by pointing out as follows:

"Well, first, the regular longshoremen get the first—the fully registered men on the basis of seniority get the first chance at the job. Any work left over comes to the temporary pool or the partially registered men."

Some of the differences in annual pay are explained by the increased job opportunity by being placed on the fully registered board and the layoff, due to the complained of injury, of 184 days, and the fact that due to a sprained ankle to was

unable to work from September 18, 1954, until December 6, 1954.

The method of ascertaining damages used by Chief Judge Leahy, District of Delaware, in Yates v. Dann, 124 F. Supp. 125 on 133, is applicable to the situation here. In his opinion the Judge stated:

"[1, 2] Where physical disability in a particular case is such it may extend for a period of time or permanently into the future, the method of ascertaining the measure of damages is by determining the loss of earning power rather than to measure future losses by referring to past losses. A man may have a physical disability which would justify him in accepting only limited employment with a corresponding lower rate of pay, but because of economic necessity a man may assume duties beyond his physical capacity in order to earn a higher rate of pay.

"'This question was presented to the Supreme Court of Pennsylvania, in Bochar v. J. B. Martin Motors, 374 Pa. 240, at page 244, 97 A. 2d 813, at page 815: 'The defendants contend that there was no evidence of impairment of earning power and that the fact that Bochar's wages were higher after the accident than before proves no deterioration of earning ability. A tort feasor is not entitled to a reduction in his financial responsibility because, through fortuitous circumstances or unusual application on the part of the injured person, his wages following the accident are as high or even higher than they were prior to the accident. Parity of

wages may show lack of impairment of earning power if it confirms other physical data that the injured person has completely recovered from his injuries. Standing alone, however, parity of wages is inconclusive. The office worker, who loses a leg has obviously had his earning ability impaired even though he can still sit at a desk and punch a comptometer as vigorously as before. It is not the status of the immediate present which determines capacity for remunerative employment. When permanent injury is involved, the whole span of life must be considered. Has the economic horizon of the disabled person been shortened because of the injuries sustained as the result of the tort feasor's negligence? That is the test. And it is no answer to that test to say that there are just as many dollars in the patient's pay envelope now as prior to his accident. The normal status of a healthy person is to progress, and to the extent that his progress has been curtailed, he has suffered a loss which is properly computable in damages.' (Emphasis added.)''

William Patterson, a witness called on behalf of the defendant, testified that on June 28, 1953, he was aboard the vessel Golden Gate as head stevedore foreman. After such testimony, the following colloquy occurred:

"The Court: I would like to ask a question at this point. The gentleman testified he was employed by Grace Line Steamship. Is that the same company mentioned in paragraph IV of the complaint, the W. R. Grace Company.

"The Witness: They are agents for them.

"The Court: The point is, if there is any variance I want to know if there is going to be any point made of it.

"Mr. Holland (Attorney for Defendant): Perhaps I could explain and counsel can correct me if I am not correct. I think W. R. Grace & Company does stevedoring operation and they were the stevedoring contractor for this particular job and were in effect the plaintiff's employer. I think at the same time they also act in another capacity as local agent for the Johnson Line, which is a foreign corporation and therefore acted as agent and stevedoring contractor.

"The Court: If there was technically any variance, you make no point of that.

"Mr. Holland: There is no point of that, your Honor."

The above constitutes an admission that as an independent contractor, the W. R. Grace Company hired the plaintiff, Shaun Maloney, as a stevedore and entered upon the performance of said contract and the plaintiff, at all times mentioned in the complaint, acted under the orders of the W. R. Grace Company, in its capacity as an independent contractor or employer, and not as an agent of said vessel and its said owners and operators.

From a consideration of all the evidence, plaintiff's injuries were proximately caused by the negligence of the defendant without any contributory negligence on the part of the plaintiff.

The Court makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

1. The facts recited in the discussion above are hereby adopted as the Court's Finding No. 1.

2. That at all times mentioned in plaintiff's complaint, he was and is now a resident of Seattle, King County, Washington, in the Western District of Washington, Northern Division.

3. That at all times mentioned in the complaint, Johnson Line, a corporation, was a foreign corporation doing business in Seattle, King County, Washington, and the owner and operator of the steamship Golden Gate, which vessel was employed as a merchant vessel in navigable waters at Seattle, Washington.

4. That prior to the 28th day of June, 1953, the defendant entered into a contract with the W. R. Grace Company, said company agreeing to act, and acting at all times mentioned in the complaint as an independent contractor, having complete control and supervision of all operations pertaining to the loading and discharge of cargo from said vessel Golden Gate in the Port of Seattle, in the navigable waters of Puget Sound, Seattle, Washington.

5. That as an independent contractor, said W. R. Grace Company hired the plaintiff, Shaun Maloney, as a stevedore and entered upon the performance of said contract, and the plaintiff, at all

times mentioned in the complaint, acted under the orders of the said W. R. Grace Company in its capacity as an independent contractor or employer, and not as an agent of said vessel and its said owners and operators.

6. That plaintiff, pursuant to §933 of Title 33 U.S.C.A., has elected to recover damages against a third person other than his employer, viz., the said defendant, and plaintiff has notified the Commissioner of this District, administering the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§901 et seq., of said election.

7. That on or about the 28th day of June, 1953, at about the hour of 8:30 a.m., plaintiff was obliged, in the course of his employment, to descend to the 'tween-deck of No. 7 hatch of the said vessel Golden Gate. That he and other stevedores were instructed by their foreman to uncover the hatch and go in 'tween-deck and discharge the cargo in the lockers and wings. That plaintiff was the first of the group to descend and the descent was made by means of a steel ladder. That after taking a step or two, after his descent, plaintiff slipped and in trying to maintain his balance, extended his right hand and suddenly and violently fell to the surface of the said 'tween-deck in such a manner as to cause the weight of his fall to be borne on the ends of his fingers and the forepart of his hand, and that as a result of said fall, plaintiff sustained severe and permanent injuries to his right wrist and that by reason of said injuries, he has been permanently

disabled in the exercise of his occupation as a longshoreman, and has lost wages and will continue to lose wages. That by reason of said injuries, he has been caused to suffer great pain and will continue to suffer great pain in the future and may be obliged to submit to surgical treatment.

That prior to the time of receiving said injuries, plaintiff was an able-bodied man of the age of 41 years and had a life expectancy of 28.43 years.

8. That wheat was loaded on the vessel Golden Gate at Tacoma, Washington, prior to the time she arrived in Seattle on June 28, 1953, and that the presence of wheat dust and wheat kernels on the surface of the 'tween-deck where plaintiff sustained his injuries was known or should have been known to the defendant, its officers, agents or employees.

9. That plaintiff's said fall and injuries resulting therefrom were due to the negligence and carelessness of the defendant in failing to provide plaintiff with a safe place in which to work in that the surface of the 'tween-deck was rendered slippery by the presence thereon of wheat dust and kernels of wheat causing plaintiff to slip and fall as aforesaid. That the presence there of such debris —wheat dust and wheat kernels—was unknown to the plaintiff prior to his said fall and the slippery condition of the said surface was due to the negligence and carelessness of the defendant.

That plaintiff's fall and injuries resulting there-

from were occasioned solely by reason of the negligence of the defendant.

That at all of said times the plaintiff exercised due caution and that no negligence on the part of the plaintiff contributed to his fall or the resulting injuries therefrom.

10. That by reason of the hereinabove described injuries, pain and suffering, and of the impairment of plaintiff's ability to engage in his present occupation, plaintiff has been damaged as follows:

For past and future pain and suffering	$10,000
Loss of future earnings	10,000
Loss of earnings from time of accident to trial	2,300
Total	$22,300

Conclusions of Law

As conclusions of law from the foregoing facts, the Court decides:

1. That this Court has jurisdiction of the parties and the subject matter of this suit.

2. That the proximate cause of plaintiff's injuries was the failure to provide plaintiff with a safe place in which to work, and the careless and negligent manner in which said 'tween-deck was maintained in that there was allowed to accumulate upon its surface wheat dust and kernels which rendered said surface slippery and caused plain-

tiff to slip, fall and injure himself as aforesaid. That said defective and unsafe condition was the proximate cause of plaintiff's injuries, and that said condition was known, or should have been known by defendant, its agents, servants and employees in the exercise of reasonable and ordinary care.

3. That the condition of said 'tween-deck surface was unknown to plaintiff prior to his slipping and falling thereon and that the injuries resulting therefrom, all were without fault or negligence on the part of the plaintiff.

4. That plaintiff, Shaun Maloney, by reason of the said personal injuries and the pain and suffering and loss of earnings resulting therefrom, is entitled to judgment in the sum of $22,300, and for his costs incurred herein.

Let Judgment Be Entered Accordingly.

Dated: This 14th day of February, 1956.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed February 23, 1956.

[Title of District Court and Cause.]

MOTION FOR RECONSIDERATION

Comes Now the defendant Johnson Line and moves this honorable Court to reconsider the find-

ings of fact and conclusions of law in the above matter and in connection with said reconsideration to permit oral reargument thereon.

BOGLE, BOGLE & GATES,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 9, 1956.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the defendant Johnson Line and moves the Court for a new trial in the above-entitled action in which judgment was entered on or about February 28, 1956, on the following grounds:

1. Insufficiency of the evidence to support the amount of damages awarded to the plaintiff and that as a result thereof the judgment entered herein is excessive.

2. Error in law at the trial in the failure of the Court to apply the doctrine of transitory unseaworthiness and under that doctrine in failing to find that defendant did not have actual or constructive notice of the alleged unsafe condition of the vessel.

This motion is based upon the file herein, upon the transcript of testimony and upon the attached affidavits of Robert V. Holland and James R. Shields.

Dated at Seattle, Washington, this 2nd day of March, 1956.

BOGLE, BOGLE & GATES,
Attorneys for Defendant.

AFFIDAVIT OF ROBERT V. HOLLAND

State of Washington,
County of King—ss.

Robert V. Holland, being first duly sworn on oath deposes and says:

That he is the attorney for the defendant in the above-entitled matter and makes this affidavit in support of the defendant's motion for new trial.

That your affiant has reviewed the earnings record of Shaun Maloney as contained in the files of Waterfront Employers Association of Washington and has found that the records indicate the following earnings for Maloney immediately subsequent to his injury of June 28, 1953:

Week Ending	S. T. Hours	O. T. Hours	Total Amt. of Wages
6/29/53	10	13	$ 63.72
7/ 6/53	22	8½	75.06
7/13/53	30	27¾	155.53
7/20/53	24	18	110.16
7/27/53	18	14¼	85.05
8/ 3/53	24	24¾	132.43
8/10/53	10	19¼	83.97
8/17/53	16	13¼	77.49
8/24/53	6	9½	44.40
8/31/53	18	23¼	116.58
9/ 7/53	12	21½	95.58
9/14/53	11	21	99.25
9/21/53	24	25	133.34

Week Ending	S. T. Hours	O. T. Hours	Total Amt. of Wages
9/28/53	18	15¼	89.14
10/ 5/53	22	25	129.31
10/12/53	22	15¾	98.95
10/19/53	16	27¼	123.66
10/26/53	29½	7½	89.35
11/ 2/53	....	18	58.32
11/ 9/53	24	26	136.89
11/16/53	18	10½	72.90
11/23/53	17½	23	112.47
11/30/53	12	13½	69.66
12/ 7/53	10	3	31.32
12/14/53	24	16½	105.98
12/21/53	6	11½	50.22
12/28/53	12	5	42.12

That your affiant has taken the earnings of the plaintiff for the year 1953 in the amount of $2,988.32 and has projected the same for the entire year since the plaintiff's testimony indicated that he was off work from September 18 to December 4, 1954, because of an ankle injury. That these figures indicate that the earnings of the plaintiff for the year (but for the injured ankle) would have approximated $3,787.28.

That the plaintiff testified that for the year 1955 up to August 1, 1955, the date of trial, he earned the sum of between $2,700.00 and $2,800.00. That your affiant has projected the sum of $2,750.00 for this period of time through to the balance of the year and has determined that the plaintiff's earnings for the total year of 1955 would have approximated $4,690.42.

That the projected earnings of the plaintiff for 1955 as set forth immediately above exceeds the

largest of any year's earnings as testified to by the plaintiff.

That your affiant is aware of the plaintiff's ability to pursue his normal occupation including the act of climbing up and down ship's ladders. This information is possessed by your affiant as a result of a current file being handled by your affiant entitled Shaun Maloney v. Calmar Steamship Corporation which involves injuries sustained by the plaintiff on February 1, 1956, while climbing down a ship's vertical ladder.

/s/ ROBERT V. HOLLAND.

Subscribed and sworn to before me this 9th day of March, 1956.

[Seal] /s/ EDW. S. FRANKLIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

AFFIDAVIT OF JAMES R. SHIELDS

State of Washington,
County of King—ss.

James R. Shields, being first duly sworn on oath hereby deposes and says:

That he is employed by Waterfront Employers Association in charge of payroll records.

That the Waterfront Employers Association is an organization of stevedores and stevedore contractors one of whose functions is to consolidate the payments of all earnings to stevedore and long-

shore employees. That the payments of said earnings and the keeping of records thereof are handled through the Waterfront Employers record section.

That the records of said section indicate the following gross earnings for Shaun Maloney for the period August 1, 1955, to February 27, 1956: $2,040.50.

/s/ JAMES R. SHIELDS.

Subscribed and sworn to before me this 9th day of March, 1956.

[Seal] /s/ ROBERT V. HOLLAND,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed March 9, 1956.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3678

SHAUN MALONEY,

Plaintiff,

vs.

JOHNSON LINE, a Corporation,

Defendant.

JUDGMENT

The above-entitled matter having duly come on for trial before the Court without a jury, on the

3rd day of August, 1955, and the plaintiff appearing in person and by his attorneys, Philip J. Poth and Milton H. Soriano of Zabel & Poth, and the defendant being represented by Bogle, Bogle & Gates and Robert V. Holland, and testimony having been offered and briefs filed by both parties, and the Court having filed its Memorandum Opinion and Findings of Fact and Conclusions of Law and Order for Judgment, Now, pursuant to said order for judgment, it is hereby

Ordered and Adjudged that the plaintiff, Shaun Maloney, have judgment against the defendant, Johnson Line, a corporation, in the sum of Twenty-two Thousand and Three Hundred Dollars ($22,300.00), together with interest thereon at the date of this judgment at the rate of six per cent (6%) per annum, and for costs and disbursements in this action to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of this Court in the sum of $46.60.

Done this 1st day of March, 1956.

/s/ ROGER T. FOLEY,
United States District Judge.

Approved and Notice of Presentation and Entry waived.

ZABEL & POTH,

By /s/ MILTON H. SORIANO,
Of Counsel for Plaintiff,
Shaun Maloney.

Approved as to Form and Notice of Presentation and Entry waived.

BOGLE, BOGLE & GATES,

By /s/ ROBERT V. HOLLAND,
Of Counsel for Defendant.

[Endorsed]: Filed and entered March 12, 1956.

March 13, 1956.

Milton H. Soriano,
518 Fourth and Pike Bldg.,
Seattle, Washington.

Robert V. Holland,
603 Central Bldg.,
Seattle, Washington.

Gentlemen:

Re: Shaun Maloney vs. Johnson Line, a Corp.—Cause 3678.

Pursuant to Rule 77(d) F.R.C.P., you are hereby notified that Judgment for plaintiff in sum of $22.-300.00 and costs of $46.60 was signed by Judge Roger T. Foley on March 1, 1956, and filed and entered in this office on March 12, 1956.

Yours very truly,

MILLARD P. THOMAS,
Clerk.

JT:t

[Title of District Court and Cause.]

REPLY OF PLAINTIFF TO DEFENDANT'S MOTION FOR NEW TRIAL

Comes now the plaintiff and respectfully submits that defendant's Motion for New Trial should be denied by this honorable Court on the following grounds:

I.

That the amount of damages is adequately supported by the evidence.

II.

That there is no error in law.

III.

That there is no newly discovered evidence or evidence that defendant was prevented from producing at the trial which would entitle defendant to a new trial.

a. That plaintiff has sustained as great or even greater loss of earnings since the time of trial.

b. The matter of plaintiff's past earnings were fully before this Court at the trial of this cause. The office manager of Waterfront Employers of Washington in charge of keeping Mr. Maloney's earnings at the time of his injury was produced at the trial as a witness in behalf of the defendant. He even made a graph of his earnings. Full opportunity was accorded the defendant in this regard. No ground for claiming newly discovered evidence can be asserted by now restating Mr. Maloney's

work record on a weekly, instead of daily, monthly or annual basis. Actually the great variation in the number of hours worked in the weeks following his injury corroborates Mr. Maloney's testimony that he had to lay off from time to time because of the swelling in his wrist, and his inability to perform the harder types of work, and that subsequent to the weekly periods set forth in defendant's affidavit, the plaintiff was required to stop work completely while his wrist was placed in a splint and intensified medical treatment undertaken.

c. That the plaintiff, Shaun Maloney, is not engaged in subsequent litigation.

This Reply is based upon the file herein, the transcript of testimony and affidavits of Shaun Maloney, Samuel H. Bayspoole and Bennie Kongsle hereto annexed.

ZABEL & POTH,

By /s/ PHILIP J. POTH,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

Shaun Maloney, being first duly sworn, on oath, deposes and says:

That he is the plaintiff herein; that his earning capacity has not increased since the trial of the ac-

cident; that his ability for work is still impaired by reason of his injury; that workmen employed with him have earned approximately one-third more wages than he has; that his earnings for the year 1955, were in the amount of $4,505.68, whereas fellow workmen have made in excess of $6,000.00 for the same period; that the reason for the continued disparity in his wages is that his condition still causes him considerable wage loss due to the painful swelling of his wrist.

Affiant declares that he has had continued difficulty in performing his work but denies that he is maintaining any subsequent lawsuit and particularly denies that there is any suit in existence entitled, Shaun Maloney vs. Calmar Steamship Corporation, or that any demand has been made on threat of suit, or that he has authorized anyone to commence suit or make demand in his behalf.

/s/ SHAUN MALONEY.

Subscribed and sworn to before me this 16th day of March, 1956.

[Seal] /s/ MILTON H. SORIANO,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington.
County of King—ss.

Samuel H. Bayspoole, being first duly sworn, on oath, deposes and says:

That he is a longshoreman employed on the Seattle waterfront with Shaun Maloney, the plaintiff above-named; that during the year 1955, your affiant earned the sum of $6,601.77; that he knows that Shaun Maloney has been unable to earn as much money as the rest of the longshoremen, because of an injury to his wrist which has prevented him in the past and still prevents him from all types of work.

Further, affiant sayeth not.

s/ SAMUEL H. BAYSPOOLE.

Subscribed and sworn to before me this 16th day of March, 1956.

[Seal] s/ MILTON H. SORIANO.
Notary Public in and for the State of Washington,
Residing at Seattle.

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

Bennie Kongsle, being first duly sworn, on oath, deposes and says:

That he is acquainted with Shaun Maloney by reason of working with him as a longshoreman; that both he and Shaun Maloney have the same job opportunity, but Shaun Maloney is unable to do all of the work that the rest of the longshoremen are able to do because of a painful and swollen wrist which keeps him from doing all types of work and at times requires him to check out on a job because of the difficulties he experiences; that in the year 1955, this affiant earned $6,529.98.

Further, affiant sayeth not.

/s/ BENNIE KONGSLE.

Subscribed and sworn to before me this 16th day of March, 1956.

[Seal] /s/ MILTON H. SORIANO,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed March 16, 1956.

United States District Court
District of Nevada

Judge's Chambers
Las Vegas, Nevada

Roger T. Foley
P. O. Box 889

April 10, 1956.

Mr. Millard P. Thomas,
Clerk,
United States District Court,
308 U. S. Court House,
Seattle 4, Washington.

In re: Maloney v. Johnson Line, No. 3678.

Dear Mr. Thomas:

You will find enclosed copies of letters addressed to counsel for plaintiff and defendant in the above-entitled matter.

Please enter an Order in the minutes of the Court as follows:

> That the motion for new trial in the above matter stand submitted twenty (20) days after the date of entry of this Order and that counsel for plaintiff and defendant may file memorandum of authorities in support of their respective contentions on or before the expiration of said twenty (20) days.

With best wishes to you and all of our friends in Seattle, I am

Very truly yours,

/s/ ROGER T. FOLEY,
U. S. District Judge.

Encls.

In the United States District Court, Western District of Washington, Northern Division

SHAUN MALONEY,

Plaintiff,

vs.

JOHNSON LINE, a Corporation,

Defendant.

ORDER ON DENYING MOTION FOR NEW TRIAL

Defendant Johnson Line moves for a new trial upon the following grounds:

1. Insufficiency of the evidence to support the amount of the damages awarded to the plaintiff, and that as a result thereof the judgment entered herein is excessive.

2. Error in law at the trial in the failure of the court to apply the doctrine of transitory unseaworthiness, and under that doctrine, in failing to find that defendant did not have actual or con-

structive notice of the alleged unsafe condition of the vessel.

This action was brought pursuant to Section 933 of Title 33, United States Code Annotated, and in an action pursuant to the same statute, The Wearpool, 112 Fed. (2) 245, 246, the Circuit Court of Appeals of the Fifth Circuit confirmed the findings of the Court below and stated:

"It is elementary that it is the duty of a vessel to provide a reasonably safe place for longshoremen to work and reasonably safe means of access to the part of the ship in which they are to perform their duties. The evidence in the record supports the findings of facts by the District Judge and we concur in his conclusion as to the liability of the vessel * * *"

Among the findings in this case are the following:

"Finding 8. That wheat was loaded on the vessel Golden Gate at Tacoma, Washington, prior to the time she arrived in Seattle on June 28, 1953, and that the presence of wheat dust and wheat kernels on the surface of the 'tween-deck where plaintiff sustained his injuries was known or should have been known to the defendant, its officers, agents or employees.

"Finding 9. The plaintiff's said fall and injuries resulting therefrom were due to the negligence and carelessness of the defendant in failing to provide plaintiff with a safe place in which to work in that the surface of the 'tween-deck was

rendered slippery by the presence thereon of wheat dust and kernels of wheat causing plaintiff to slip and fall as aforesaid. That the presence there of such debris—wheat dust and wheat kernels—was unknown to the plaintiff prior to his said fall and the slippery condition of the said surface was due to the negligence and carelessness of the defendant.

"That plaintiff's fall and injuries resulting therefrom were occasioned solely by reason of the negligence of the defendant.

"That at all of said times the plaintiff exercised due caution and that no negligence on the part of the plaintiff contributed to his fall or the resulting injuries therefrom."

The above and other findings are amply supported by the evidence.

Judge Hawley of the Nevada District, speaking for the Circuit Court of Appeals, Ninth Circuit, in The Joseph B. Thomas, 86 Fed. Rep. 658, 660, in a case where the relationship of the parties was identical to that here, stated:

"What are the principles of law applicable to this case?

"1. What duty did appellants owe to appellee? Their duty was to provide him a safe place in which to work, and to exercise ordinary and due diligence and care in keeping the premises reasonaly secure against injury or danger. This is the pith and substance of all the decisions upon this subject as ex-

pressed in the great variety of cases, each having reference to the special facts and surroundings of the evidence relating thereto. * * *''

In the recent case Lahde v. Soc. Armadora del Norte, a Corporation, 220 Fed. (2), 357, 361, the Court of Appeals of the Ninth Circuit reaffirmed the Thomas case, supra, in its holding that a ship owner has to invitee stevedores, as to its sailors, the duty to furnish a safe place to work, and that duty is non-delegable.

The framers of the Complaint here commingled a claim for damages based upon negligence with a claim based upon the alleged unseaworthiness of the vessel. These claims were not separately stated as in the complaint in Daniels v. Pacific-Atlantic Steamship Company, 120 F. Supp. 96 (D.C.E.D. N.Y.). The findings in the present case if not adequate on the question of unseaworthiness are sufficient as to negligence, and the effect given by this Court of such findings find support in Lahde v. Soc. Armadora del Norte, supra, and is Pope & Talbot v. Hawn, 346 U. S. 406, 413, where the Supreme Court of the United States held the plaintiff, not being a seaman, is not barred by the Osceola, 189 U. S. 158, from maintaining a negligence action against the shipowner, saying:

"The fact that 'Sieracki' upheld the right of workers like Hawn to recover for unseaworthiness does not justify the argument that the Court thereby blotted out their long recognized right to recover in admiralty for negligence."

Unlike the facts in Daniels v. Pacific-Atlantic Steamship Company, supra, there is evidence here that the wheat dust and wheat kernels were present on the surface of the 'tween-deck for a considerable length of time prior to the accident.

The Court sees no merit in the contention that the amount of damages awarded is excessive.

The Motion for New Trial is denied upon all the grounds urged.

Dated: This 6th day of July, 1956.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed July 11, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS

Notice is hereby given that Johnson Line, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 12, 1956.

Dated August 1, 1956.

BOGLE, BOGLE & GATES,
Attorneys for Defendant.

[Endorsed]: Filed August 3, 1956.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Johnson Line, a corporation, as principal, and Fireman's Fund Indemnity Company, a corporation, as surety, are held and firmly bound unto Shaun Maloney in the full and just sum of Two Hundred Fifty ($250.00) Dollars, to be paid to the said Shaun Maloney, his successors, executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves, our successors, assigns, heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 3rd day of August, 1956.

Whereas, on March 12, 1956, in an action pending in the United States District Court for the Western District of Washington, Northern Division, between Shaun Maloney as plaintiff and Johnson Line, a corporation, as defendant, a judgment was rendered against the said defendant and the said defendant having filed a notice of appeal from such judgment to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such, that if the said defendant shall prosecute its appeal to effect and shall pay costs if the appeal is

dismissed or the judgment affirmed, or such costs as the said Court of Appeals may award against the said defendant if the judgment is modified, then this obligation to be void; otherwise to remain in full force and effect.

JOHNSON LINE,
A CORPORATION,

By BOGLE, BOGLE, & GATES,
Its Attorneys,
Principal.

FIREMAN'S FUND, INDEMNITY COMPANY, A CORPORATION.

By /s/ CASSUIS S. GATES,
Its Attorney in Fact,
Surety.

[Endorsed]: Filed August 3, 1956.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3678

SHAUN MALONEY,

Plaintiff,

vs.

JOHNSON LINE, a Corporation,

Defendant.

TRANSCRIPT OF TESTIMONY

OSCAR HURST

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Poth:

Q. Will you state your name, please?

A. Oscar Hurst.

Q. Where do you live?

A. I live in Seattle; 428-26th South.

Q. What is your occupation?

A. My occupation is longshoring.

Q. How long have you been a longshoreman?

A. I have been longshoring pretty close to twelve years.

Q. What was your occupation on the 28th day of June, 1953?

A. My occupation was longshoring, stevedoring.

(Testimony of Oscar Hurst.)

Q. Where did you work on that day? [1*]

A. I worked over on the ship called the Golden Gate, I think it was.

Q. Whereabouts was that ship, if you remember?

A. I think that was at East Waterway, if I am not mistaken.

Q. What time did you go to work?

A. I went to work at 8 o'clock.

Q. Was that 8 o'clock in the morning?

A. 8 o'clock in the morning.

Q. And what hatch, if any, were you assigned to?

A. I just forget now. It was the after end of the ship. The after end of the ship.

Q. And what, if anything, did you do when you went to that hatch at the after end of the ship?

A. Well, the first thing we did was to—is to take off the tarpaulins and then take off the hatches and then descend below to work the cargo.

Q. Did you go below? A. Yes, I did.

Q. How did you go below? What means did you use? A. Well, we went down a ladder.

Q. Did anybody go down that ladder before you?

A. Yes, there were two or three men before me; at least two or three before me.

Q. Do you know who the first man down the ladder was? A. Yes, I do remember.

Q. Who was that? A. That was Maloney.

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*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Oscar Hurst.)

Q. And is Maloney here in the courtroom?

A. Yes, sir.

Q. How long have you known Mr. Maloney? [2]

A. I have known him for quite some time.

Q. How many times have you worked with him, if you recall?

A. Yes. Different places and different times.

Q. What happened, if anything, that you saw after you went down there or started down?

A. Well, looking from the top deck you couldn't see much anyhow, but on my way down I heard him say, "Fellows, look out. It is quite dangerous down here. It is very slippery." He says, "I just fell." But I couldn't see what was going on or what happened because my back was to him coming down the ladder and in the meantime he hollered and says, "Look out. It is very slipperly down here."

Q. And what was the condition that you found there?

The Court: I want to make certain. His last statement didn't quite cover everything he said in his first statement. What was it Mr. Maloney said?

The Witness: He said, "Fellows, look out when you hit the deck. It is very slippery." He says, "It is dangerous. I just fell," he says.

Q. He said, "I just fell"?

A. "I just fell," yes.

Q. What was the condition, if any, down there that you found?

A. Well, I found a lot of dust from wheat and kernels of wheat all over the deck. I guess where

(Testimony of Oscar Hurst.)

they had been pouring wheat in the ship previous to the time and there was a lot of dust and it is very slippery on the deck there. The kernels, you slip and slide. [3]

Q. Did you work cargo there that morning?

A. Yes, we did. We worked cargo.

Q. What sort of cargo was it?

A. I just forget. It was bales and stuff like that, boxes.

Q. Did you load or discharge it?

A. Discharged it.

Q. And where was that cargo that you worked?

A. They were in the lockers and some were in the wings.

Q. On what deck? A. 'Tween-deck.

Q. Was there any wheat stowed in that 'tween-deck?

A. Yes, there must have been because——

Q. At that time?

A. Yes, there was wheat in that hatch and wheat on the floor from the feeder box. They had a big feeder box in the hatch and that feeder box was full of wheat and also on the deck there was dust and wheat all over the deck because Mr.——

The Court: We are referring to the deck that is below, isn't that it?

The Witness: Yes, sir.

Q. And when you got down what happened then, if anything?

A. Well, he said, "I hurt myself." He says, "We should clean this thing up before we do any-

(Testimony of Oscar Hurst.)

thing on the ship." So then we called for a net and some brooms and stuff that they have on the ship, some brushes, rather, on the ship and we started cleaning it up and got the trash net and then got it cleaned up so we could work the ship because it was too [4] dangerous to walk around there.

Q. Was that your job to clean that ship?

A. No, sir, that is not our job to clean those ships. It is our job to do stevedoring.

Q. What does stevedoring consist of?

A. Consists of moving and removing cargo, loading and unloading.

Q. How long before you started to load cargo that morning?

A. Oh, it must have been around about—I don't know—quite a little while because it took quite a bit of time cleaning up the ship. At least a hour or more.

Q. Had you been told to clean that ship up when you went down there?

A. No, they never told us nothing about cleaning up the ship.

Q. Had they warned you about the condition down there?

Mr. Holland: I object to that as leading.

The Court: Overruled.

Q. State whether or not anyone from the ship, that is the officers, the crew of the ship, or anyone had informed you or anyone in your hearing of any conditions existing in the hold of that ship before you went down?

(Testimony of Oscar Hurst.)

A. No, they never said a word. They said get down in the hold and get that cargo out.

Mr. Poth: I think that is all. [5]

The Court: I would like to ask a question. What was the condition there at the time Mr. Maloney went below as to whether there was any light in there?

The Witness: There was a little light, because it was—just the daylight, naturally of the hatch.

The Court: There was some daylight coming in there?

The Witness: A little, not too much.

The Court: All right.

Cross-Examination

By Mr. Holland:

Q. Mr. Hurst, had you ever been in that hatch before on that day until you went down on this occasion? A. No, I never have.

Q. You hadn't been on the vessel the previous day, had you? A. No.

Q. You don't know what the condition in that lower hold was at the time the vessel was at its last port prior to coming to Seattle, do you?

A. No, we don't. We never know.

Q. When you said that no one warned you and that they just told you to go below and get the cargo out? A. That is it.

Q. You are talking about the orders from your own—— A. Hatch tender.

Q. He is a member of your gang? [6]

(Testimony of Oscar Hurst.)

A. At the time.

Q. You had no conversations or discussions with any of the ship's crew, did you? A. No.

The Court: What was that last question?

(Last question and answer read by the reported.)

Q. How much of the area of that 'tween-deck hatch was taken up by the feeder box?

A. Now, I just forget now. I forget how much area, but at least—I know I saw a lot of wheat there. That is, the feeder box, I could just barely see it.

Q. Was there wheat in the feeder box?

A. Yes, there was wheat in the feeder box?

Q. How could you tell? Did you see that?

A. Well, we could see all around it. It was dark in that end. We could see something in there and it looked like wheat.

Q. Is the feeder box completely enclosed when you look at it in the 'tween-deck area?

A. Not enclosed, no.

Q. Where is the opening for the feeder box?

A. The opening is right in the center.

Q. On the 'tween-deck level?

A. Yes. Sometimes they stand above the deck a little bit.

Q. Did it in this case, stand above the deck?

A. I don't remember now if this stood above the deck or just even with the deck or not.

Q. We are talking about the 'tween-deck, aren't we? [7] A. Yes.

(Testimony of Oscar Hurst.)

Q. You could just go over and look down in the feeder box and see the wheat?

A. Well, we could if we could see back in there. As a rule most generally it is dark in that part of the ship.

Q. Did you on this occasion do that, look in the feeder box. Go down and look in the feeder box?

A. No, I didn't.

Q. In other words, the only way you know there might have been wheat there was because you saw some on the deck?

A. On the deck, yes.

Q. The feeder box could have been empty as far as you know personally.

A. No, we heard——

Q. I say, as far as you know personally.

A. It could have been, but it looked to me that there was wheat in there.

Q. You mean wheat around it? A. Yes.

Q. You didn't look in it?

A. I disremember now. I forget. It's been quite a while, whether they had a lot of wheat in there or not.

Q. Was this wheat on the deck mostly over by the feeder box, around it?

A. I don't get you.

Q. Was most of the wheat that was on the deck over near the feeder box? [8]

A. No, it was quite a ways from the feeder box, a little ways.

(Testimony of Oscar Hurst.)

Q. How far?

A. I don't know. I should say ten, fifteen, twenty feet, something like that; fifteen feet.

Q. Where was the cargo stowed in the 'tween-deck? A. In lockers.

Q. Out in the wings?

A. Well, in the wings and some in the forward end or after end, whichever end of the ship.

Q. Out away from the center of the hatch?

A. Yes, sir.

Q. What kind of cargo was it?

A. There was bales and different things. I forget now what. Bales, of course, you don't know what is in the cargo in the bales.

Q. Did you find it necessary to lay any boards or anything for your dollies? A. No.

Q. Did you use hand trucks?

A. We always do if it is heavy stuff, heavy cargo we use hand trucks.

Q. At the time you went below how much of the hatch at the main deck level, at the top level, was uncovered?

A. I just forget now whether we uncovered the whole thing or not. I don't think we did. No, we uncovered most of it, I am pretty sure we uncovered most of it.

Q. Most of it. That would have let plain daylight down into that hatch? A. Yes, some. [9]

Q. You uncovered enough for the gear to come down and pick up the cargo you were going to unload?

(Testimony of Oscar Hurst.)

A. Yes, we uncovered enough so we could get the gear down below.

Mr. Holland: I have no further questions.

Mr. Poth: Nothing further.

(Witness excused.)

SHAUN MALONEY

called as a witness in his own behalf, being duly sworn, testified as follows:

Direct Examination

By Mr. Poth:

Q. Will you state your name, please?

A. Shaun McGillan Maloney.

Q. Where do you live?

A. 2338-22nd South, Seattle.

Q. What was your occupation on the 28th day of June, 1953? A. Longshoreman, stevedore.

Q. And had you received any directions where to work that day?

A. I had received directions the previous evening to report to the Golden Gate at the East Waterway Dock at 8:00 a.m., Sunday morning.

Q. What time did you arrive there?

A. I imagine about five minutes to eight. We start work at 8 o'clock.

Q. Where were you ordered to go to work aboard that ship?

A. To the fartherest hatch aft. I believe it was number [10] seven.

(Testimony of Shaun Maloney.)

Q. If you know, when had the ship come in?

A. Sometime during the night.

Q. If you know, had there been any longshoremen aboard the ship after she came in prior to the time you came aboard?

A. No, there was no one aboard, other than the crew.

Q. Do you know where she had come from?

A. She had come from sea. I don't know what port.

Q. When you got back to the number seven hatch —by the way, how many hatches were there aboard the vessel?

A. This particular ship is one of the new ones owned by the Johnson Line of Sweden and they have seven hatches.

Q. And one of the forward part is numbered number one, is that right?

A. That is right.

Q. And you were in the last one on the stern of the ship? A. That is right.

Q. What was the condition of that hatch at the weather deck level as you went down there?

A. As I recall there was the small punt or raft that the sailors paint with, a couple of other boxes on the deck, and that is all that was on the deck to my knowledege that I recall. The hatch was covered.

Q. How was it covered?

A. As is the usual manner, with pontoons or hatch covers and tarpaulins over them.

Q. As you saw the hatch was it in condition for sea? A. Yes, it was. [11]

Q. What is meant by having a hatch secured in condition for sea at the weather deck level?

A. When a hatch is secured for sea, the tarpaulins are battened down, there are cleats along the hatch coamings, there are iron bands in there to hold the tarpaulin tight to the hatch coaming, and there are cross battens across the top of the ship to hold the hatch boards or pontoons and the tarpaulins down. The hatches were covered, the tarpaulins were on and some wedges were in there, with no cross battens at this particular time on this particular ship.

Q. What did you do then?

A. First, we were instructed by the foreman to uncover and go in 'tween-deck and discharge the cargo in the lockers and wings.

Q. Did you see any members of the ship's company when you went aboard that vessel?

A. Yes, there were probably two or three standing around up on the midships section.

Q. Were you able to tell whether or not they were officers or simply members of the crew?

A. I would assume them to be unlicensed crew members because the officers on most all ships wear hats and caps and uniforms denoting their rank.

Q. After you removed—did anybody from the crew or any officer speak to you that morning?

A. None.

Q. Did you hear them speak to anyone else that morning?

(Testimony of Shaun Maloney.)

A. Not to my knowledge. I heard no conversation between [12] the crew members.

Q. After you removed the tarpaulins and the hatch covers as you have related, what next did you do? A. I started down the ladder.

Q. Where was this ladder located?

A. It is on the after end of the hatch, midships. That is, in the middle of the ship.

Q. What type of ladder was it?

A. It was a steel ladder, steel rungs welded into the after end of the hatch in the middle of the hatch I mean, in the middle section.

Q. That was part of the ship's permanent equipment?

A. Part of the ship's permanent equipment, yes, sir.

Q. Now, you say you went down the ladder. What happened, if anything, then?

A. When I come down the ladder, I was starting across the hatch towards the inshore side of the ship and I made a step or two and I slipped and I fell. In trying to catch my balance I extended my right hand and I fell on it, somehow, on the ends of the fingers and on the forepart of my hand.

Q. Did anybody proceed you down that ladder?

A. No, sir, I was the first man down.

Q. What, if anything caused you to slip and fall?

A. The hatch was covered with a heavy cover-

(Testimony of Shaun Maloney.)

ing of dust, wheat dust apparently from the feeder box and wheat kernels, kernels of wheat that were quite liberally scattered all over the hatch.

Q. And state the effect, if any, of that condition?

A. Well, it created a very slippery condition. You [13] couldn't stand up very well, and the wheat kernels if you would step on them would certainly cause you to lose your balance and fall, which I did.

Q. Did you have notice of that condition?

A. No.

Q. How is it that you had no notice of that condition before you go down there?

A. We had no instructions other than to go down to uncover and go to work, to get the cargo out of the 'tween-deck.

Q. When you came down the ladder or looked from the upper deck could you see that dust and wheat there?

A. No. I think we uncovered two sections of the hatch and it didn't appear from the weather deck level that there was anything exceptionally wrong on the 'tween-deck level.

Q. What happened after you fell?

A. Well, after I fell I picked myself up and I hollered to the other lads coming down the ladder to be careful that it was slippery, very slippery.

Q. Then what happened? What did you do, if anything?

(Testimony of Shaun Maloney.)

A. When the balance of the gang got into the hatch we decided that it was not safe to work and that before we done any work we would have to get some cleaning gear and clean the hatch up. That is, the section of the hatch where we were to work.

Q. How long have you been a longshoreman?

A. Five years.

Q. And before you were a longshoreman, what was your occupation? [14]

A. I was a sailor.

Q. In the Merchant Marine?

A. Yes, sir.

Q. How long were you a seaman in the Merchant Marine? A. Ten years, about.

Q. Are you familiar with the ordinary and regular duties of longshoremen? A. I am.

Q. Are you familiar with the custom and practices generally of sailors aboard ships?

A. I am.

Q. What is the custom and practice as between the two groups of keeping the decks of the vessel clean?

Mr. Holland: Now, if the court pleases, the portion of that question which would refer to the duties customarily of a crew of a vessel we would object to unless the witness states he served as a seaman aboard a Swedish vessel which for all we know may have completely different customs or practices.

The Court: I would like to have a little authority on that proposition. It just doesn't appear to

(Testimony of Shaun Maloney.)

me to be reasonable. It would seem to me it would be a duty imposed upon all crews. If there is duty on one it ought to apply to all other crews.

Mr. Holland: Well, I would agree as to American vessels on this coast and this country.

The Court: I will permit the question. If you can show me anything to the contrary we might consider the point later. The objection will be overruled. [15]

A. To my knowledge and experience it is always the responsibility of the mate of the ship who acts for the captain to keep the decks, the ladderways and the gang planks clear and clean at all times.

Q. Now, Mr. Maloney, I believe you mentioned you injured your wrist, is that correct?

A. Yes, sir.

Q. What wrist is that?

A. My right wrist.

Q. And before you had that fall what was the condition of your right wrist?

A. It was good, normal. I was able to do all the work that I was ever required to do with it without pain or discomfort.

Q. Had you ever injured it before?

A. No, sir.

Q. And what trouble have you had with it since?

A. Well, when I work on certain jobs it is much more worse than others. Some jobs it doesn't bother at all hardly, but now it bothers me where it becomes sore and I lose my grip and the arm, if it

(Testimony of Shaun Maloney.)

really is aggravated, I have pains up and down the arm.

Mr. Poth: Your Honor, the doctor has just come in the courtroom.

The Court: Would you like to take the doctor out of order so he could return to his office?

Mr. Poth: That would be appreciated.

Mr. Holland: No objection.

(Witness temporarily excused.) [16]

DR. BERNARD GRAY

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Poth:

Q. Will you state your name, please?

A. Bernard Gray.

Q. Where do you reside?

A. 1110 34th Avenue South, Seattle.

Q. Are you a licensed and practicing physician and surgeon under the laws of the State of Washington? A. Yes.

Q. And do you maintain offices in this city?

A. Yes.

Q. Where are those offices, Doctor?

A. In the Stimson Building, Fourth Avenue, Seattle.

Q. Do you practice any particular specialty?

A. Yes, orthopedic and traumatic surgery.

(Testimony of Dr. Bernard Gray.)

Q. What training have you had for your particular specialty, Doctor?

A. After I graduated for the University of Manitoba Medical School in 1935 I was surgical resident at the Deerlodge Hospital in Winnipeg and at Seaview Hospital in New York City. I had three years of orthopedic surgery at Permanente Foundation Hospital in Oakland, California.

Q. Are you a member of any societies or groups in connection with the practice of your profession, Doctor, and your specialty?

A. Yes, I am a Clinical Instructor in Orthopedics at the University of Washington Medical School, and [17] member of the Western Orthopedic Association.

Q. How long have you been teaching at the University of Washington Medical School?

A. About four or five years.

Q. And during your practice have you had occasion to see and examine Shaun Maloney, the plaintiff in this case? A. Yes.

Q. When did you first see him, doctor?

A. On December 28, 1953.

Q. What did your examination show, if anything, Doctor?

A. He told me that he had been hurt six months previously on June 28, 1953. He was a longshoreman aboard a vessel and he stated that he slipped on some wheat apparently and in order to catch himself—or, he caught himself on his wrist and in so doing he hyperextended or bent his wrist

(Testimony of Dr. Bernard Gray.)

backward rather forcefully He said that he had immediate pain and his wrist became very painful and swollen by the next day. He consulted his doctor, Dr. Smith, who put him on treatment at that time.

Q. That is, Dr. Smith was the company doctor?

A. I don't know if Dr. Smith is the company doctor or not.

Mr. Holland: Well, counsel, will you agree when you say company you mean the stevedore company and not the Johnson Line?

Mr. Poth: The carrier.

The Court: There is no testimony here on that point. The doctor just stated that the plaintiff had consulted his own doctor. That is the [18] testimony of the witness.

Mr. Holland: Yes. I didn't like the implication he was our company's doctor.

The Court: I am not going to be influenced by implications, I hope. Not such slight ones, anyway.

A. At any rate, he was referred to Dr. Smith who treated him. He had some physical therapy. He had no time loss and he states that he favored his wrist for a couple of months and it tended to improve for a while and then got worse. He said he had never hurt his wrist before. He was right handed. At the time I first saw him I noted that as far as examination was concerned, there was ten degrees limitation of motion forward and backward at the wrist. That the grasping power of the hand was

(Testimony of Dr. Bernard Gray.)

weak and there was some swelling at the top of the wrist and the circumference of the wrist was three-eighths of an inch greater than the left. I made some X-rays at the time which revealed nothing significant. I advised that he wear a leather cuff, a so-called Colles cuff, which would immobilize the wrist and take the load off of it. I suggested he come back and see me in about ten days and that was the last I saw of him until a few days ago.

Q. What did you find on this second examination?

A. I saw him August 1, 1955. He told me that after I had seen him he had been seen again by his doctor who immobilized the wrist in plaster for a few weeks and advised surgery to the wrist. He was then sent to [19] Dr. Morris Dirstine who examined him and recommended X-ray treatment and applied the cuff which had been recommended. At that time he was off work for an interval. X-ray treatment did not contribute much to his relief. He had been working since that time, most of the time doing lighter work. At the time I saw him he was driving a bull. If his work would tend to be heavy he wore his cuff. He had certain residual complaints with reference to the right wrist. He had pain in lifting, especially if the hand was in hyperextension, with the wrist bent backwards. Any exertion caused pain and tended to persist for variable lengths of time. The swelling or lump he had at the back of the right wrist would blow up at times and

(Testimony of Dr. Bernard Gray.)

quieten down at times, but there always was some swelling there and the only relief he could get was if he did not exercise his wrist or if he wore his cuff. At the time I examined him I thought that the range of motion was the same as before. There was some limitation of motion, ten degrees, which can be estimated as equivalent to about fifteen per cent. There was a small ganglion or lump at the back of the right wrist which was tender and which could be made to enlarge by bending the hand down. There was slight weakness of grip in the hand, but this was not marked. There was pain on forced motion of the wrist. That is about the extent of the findings on examination. I took new X-rays which showed no change and nothing significant.

Q. What is the prognosis, Doctor, of this condition? [20]

A. Oh, I think that he has got a stationary condition, or, the basis of the condition is stationary. I think that with over-exertion he will have aggravation. I think he will probably end up having surgery on this wrist and an attempt made to remove this ganglion.

Q. You do definitely find a ganglion present, Doctor, is that right?

A. Yes. If removal of the ganglion is successful I think he will have some improvement. If it is not successful, or if it will recur, his condition will be the same. I think the stiffness of the wrist, whatever degree of limitation of motion he has, will be permanent, whether the ganglion is removed or

(Testimony of Dr. Bernard Gray.)

not. I think if he did light work for a long period of time the tendency would be that he would feel pretty good, but when he went back to heavy work he would have some trouble in his wrist again.

Q. Now, Doctor, I may be using the wrong word, but what is the etiology of this ganglion?

A. This is the cause of the ganglion. These things are due to injury or strain. It does not have to be an acute injury. Most commonly what happens is that there is degeneration in the ligaments that connect the small bones together and a fluid is formed and a cyst is formed. At times a ganglion is due to a pouching out of the joint into the tissue. A little defect develops in the ligament between the bones and through that defect increased fluid within the joint pouches the joint lining out and you get a true cyst. Something like a tire before it [21] blows out. That sort of ballooning. Some of these ganglions are lined by the same lining that lines the joint. Occasionally a ganglion is a pouching out of the lining of a tendon sheath that passes over the wrist. These tissues are all relatively the same types of tissues, but there is—a lining that tends to be irritated tends to pour out fluid and with increased exertion they usually get larger and with rest they often get smaller.

Q. On a permanent basis are you able to evaluate his condition at this time?

A. I don't follow your question, sir.

Q. Well, as to a degree of disability, if any?

(Testimony of Dr. Bernard Gray.)

A. Oh, I think the function of his right wrist has been limited and will be limited. If I was going to estimate the degree of permanent disability, I would estimate it at between fifteen and twenty per cent of the loss of the hand at the wrist.

Q. Have you formed any opinion, doctor, as to whether or not the condition that you found and described in his wrist is related to the injury which he sustained when he fell upon his wrist in the hold of that ship?

A. Well, from my history and my examination I believe that the present condition is the result of his injury.

Mr. Poth: I have no further questions.

Cross-Examination

By Mr. Holland:

Q. Doctor, was there any evidence of the ganglion at the time of your first examination? [22]

A. At the time I first saw him I noted swelling over the top of the wrist. The swelling was diffuse.

Q. Did it present substantially the same objective picture as what you saw on the second examination?

A. No. At the time of the examination the swelling was localized and I could demonstrate a ganglion.

Q. In other words, when he first came in there was swelling around the ganglion, is that what you mean?

A. There was enough swelling I couldn't demonstrate a localized bumb or local lump.

(Testimony of Dr. Bernard Gray.)

Q. The swelling was over a larger area?

A. Yes, over the back of the wrist.

Q. Who referred Mr. Maloney to you, Doctor?

A. Mr. Poth.

Q. Do you know any reason why Mr. Maloney did not come back in ten days, but waited almost two years before he came back to you?

A. I understand that the company had referred him on.

The Court: What was the answer, Doctor?

The Witness: I understand the company referred him on to Dr. Dirstine.

Q. What was the purpose of Mr. Maloney calling upon you three days ago? Was that for examination and treatment or what was it? Was it for the purposes of this trial?

A. Well, as a matter of fact I have never reported my findings to Mr. Poth or anybody else in this case. My records shows that Mr. Poth referred Mr. Maloney and he apparently wanted to come to me for treatment and when I saw him on August 1st he came in to have [23] his condition checked and I didn't know—I might have known that day or the next, he was coming to trial so I assume the purpose was for the trial, but this is the first report I have ever made to Mr. Poth or anybody else on Mr. Maloney's condition.

Mr. Holland: I have no further questions.

Mr. Poth: That is all.

(Witness Excused.)

The Court: We will take a recess for ten minutes.

(Recess taken.)

SHAUN MALONEY

resumed the witness stand.

Direct Examination

(Continued)

By Mr. Poth:

Q. Have these complains that you just related in any way affected your ability to work?

A. Yes.

Q. How has that been accomplished?

A. Well, I—if I have a job that hurts the arm, the wrist and the arm, I sometimes lay off one, two, three, four days at a time until this swelling subsides and my arm feels normal, as near normal as it can be under the circumstances.

Q. Have you kept any record of your loss of earnings?

A. Yes, I have somewhat of a record of how much time I have been off the job, how much I have worked.

Q. Was this something started since the injury or do you [24] normally keep a record of your earnings?

A. Well, I normally keep a kind of report, but I had one since 1953. I had some cards I used to keep and I just reduced it into one consecutive form.

Q. Do you have an independent recollection of

(Testimony of Shaun Maloney.)

the time that you have lost and your earnings? That is, prior to the time you were injured and after the time of the injury? Do you have an independent recollection of the dates and times and amounts, other than those records that you have?

A. Well, as I understand the question, I recently calculated the loss of time to be 184 days.

Q. How much did that represent in money?

A. Off hand, based on my 1953 earnings, it would represent around $2300, I think, off hand.

Q. That you have lost to date on account of this.

A. That is right.

The Court: How much is that?

The Witness: Approximately $2300.

Q. Does your wrist seem to be improving of late?

A. I don't thing there is much improvement. I have been able to work by picking my jobs and because of recent shipments out of this port I was able to drive bull quite a bit, so I worked more than I think I would have as a stevedore.

The Court: Doing what?

The Witness: Driving bull.

The Court: What does that mean?

The Witness: A small little truck [25] that is used to lift loads.

Q. This longshoring work that you do, is that steady work inasmuch as you go to work at the same place every day for the same employer?

A. Well, generally we work for the Waterfront Employers but the make-up of the Waterfront Em-

(Testimony of Shaun Maloney.)

ployers is several independent stevedoring contractors and steamship companies and we may work for one one day and for an entire week or we may work for two or three of those independent contractors or steamship companies in the course of a week.

Q. I believe you mentioned something about picking jobs. How is that accomplished?

A. Well, in the hiring hall where we are dispatched you are sometimes able to plug in for a job that you know to be an easier job than some of the other jobs and by watching the board and if you are lucky enough, you can probably pick a job that isn't as hard as some of the other work.

Q. What happens if the jobs all happen to be hard jobs on a particular morning?

A. Well, then as a matter of experience I generally don't peg in to go to work that day.

Q. How are the men selected? Is it on a rotation basis or just how is it?

A. The men are selected on a rotation basis. We have a board with every man's name in a consecutive manner, in a series of rows. When you wish to go to work you put your peg in the hole opposite your name and as the ships are dispatched the next man up [26] gets the next job up if he wants it or if he can handle it.

Q. Well, if he turns the job down, does he immediately get the choice of another job?

A. No, then he has to wait until all the other men have a choice of a job and then if enough work

(Testimony of Shaun Maloney.)

is available and the peg comes back to him he has a second choice, if there is enough work to go around to go that far. Some days there is and some days there is not.

The Court: In other words, if you did not accept the job you would have to wait until all the available men had their opportunity or turn.

The Witness: That is right, your Honor. Then if still more men were needed on another job you could handle your peg in for that.

Mr. Poth. I believe I have no further questions at this time.

The Court: I would like to know what the condition of the lighting was as you found it when you went down into that hatch?

The Witness: On this particular day the lighting condition I would say would be fair to good. It was natural light. We had only two sections of the hatch open. I imagine there was about thirty per cent of the hatch open and the lighting condition was fair to good. It was daylight and it would have been possible—we worked that day without any artificial lights.

The Court: That is all I have. [27]

(Testimony of Shaun Maloney.)

Cross-Examination

By Mr. Holland:

Q. Mr. Maloney, I wonder if we can get a better picture of the area in which you were working. How much distance between the deck on which you fell and the overhead or ceiling above, approximately?

A. Well, I would estimate that height between the level of the 'tween deck on which we worked, and that I think you are referring to, the deck head, at about fifteen feet.

Q. In other words, that would be the distance, approximately, that you climbed down the ladder, is that right?

A. No. There is a coaming which is an additional—well, it would be in shoreside people's language kind of a wall, the coaming on these ships is quit high and that would be four or five feet, three or four feet, anyway, so it is closer to twenty feet the length of the ladder.

Q. That you climbed down?

A. I would estimate it to be that.

Q. In speaking of two sections of the hatch being removed. What would be the dimension of that area?

A. Well, the hatch, I assume, would be twenty or twenty-two feet for ships, that is across and——

The Court: How many feet?

The Witness: Twenty or twenty-two feet.

A. And we had, as I recall, two sections off and

(Testimony of Shaun Maloney.)

these were hatchboards and they were planks, would be considered a plank, and around eight to ten foot long. [28] We had probably fifteen to twenty, somewhere in that neighborhood, fifteen or twenty feet opened on the hatch.

Q. So as you looked up from the spot you fell you would see an opening——

A. 15x20, something in that nature. I had no occasion to measure it, but I would judge from my experience on ships it was that.

Q. Which direction were you walking when you fell?

A. I was headed in a forward direction on the ship.

Q. You were out about a couple of steps?

A. A couple of steps from the ladder.

Q. And would you be roughly in the center, then, underneath the center of the opening that you described? A. Yes, on the after end.

Q. In looking up from that point it was plain daylight, was it? A. Yes.

Q. Had you ever been down in that hatch before?

A. No, not on that trip in. I think I worked the ship before, but not on that trip.

Q. At least this morning this was your first time down? A. Yes.

Q. You were the first man down?

A. I was the first man down.

Q. You had no knowledge of any condition until you found it after you slipped and fell, did you?

(Testimony of Shaun Maloney.)

A. I had no knowledge of any unsafe condition.

Q. As to the wheat that was on the deck in the area where you fell. Would you say that there was a [29] small amount of it or a great amount of it?

A. Not a great amount. It was a sprinkling of wheat kernels.

Q. And was it mostly the dust that caused you to fall or the wheat kernels?

A. I lay it to the dust mostly.

Q. Is it the dust that was slippery? In other words, normal dust that I have seen would not be slippery. I presume wheat is different?

A. It seems to be. There was a coating of heavy dust all over the hatch and there was a sprinkling of this wheat in it and I lay the cause of the slipperiness to the dust that was on the hatchboards.

Q. Did you tell us you couldn't recall if the feeder box was at the level of the 'tween deck or a little above it?

A. I don't believe I said anything about the feeder box.

Q. Maybe it was the other witness. Did you describe the feeder box for us?

A. I didn't hear you.

Q. Will you describe the feeder box for us?

A. Well, the feeder boxes are built in different ships in different manners.

Q. Tell us about this one?

A. As I recall this one, this was a feeder box that was built the entire width of the hatch in the forward section of the hatch and extending back

(Testimony of Shaun Maloney.)

some distance from the forward end of the hatch. I believe it extended well up to the coaming.

Q. That is at the main deck?

A. Well, it wouldn't go up to the main deck. It would [30] go just about to the main deck, I mean, the sides they hold it up.

Q. If you are standing by it, it would go above your head some feet.

A. As I recall, this one extended above our heads. Sometimes they don't go all the way. It depends on how much of the cargo is needed for the feeder.

Q. The feeder box, just for the sake of clarity, is in the nature of a funnel that goes through the 'tween deck and permits you to put grain in at the top and it goes through the 'tween deck into the lower hold, is that about right?

A. Well, I don't know as I understand you. My conception and understanding of the feeder boxes are when the lower holds of a ship are filled with grain there is a certain percentage of the cubic content of that cargo that is calculated will settle and the settling of grain or bulk cargoes in a ship is not a safe thing when you are at sea in heavy weather, so they have this box which is constructed to take care of a certain amount of wheat so as the grain settles this will fall down and keep the grain from shifting to side to side if you encounter heavy seas. That is the purpose of the feeder box in the general language.

Q. As you stand in the 'tween deck and look at

(Testimony of Shaun Maloney.)

this particular box it would look like a rectangular, walled thing that you could walk up to and touch and it would be above your head a little distance.

A. Yes, it would be rectangular and I think it would be above our heads in this particular [31] case.

Q. Do you know whether any grain was in it at that time or do you know?

A. I didn't look into the feeder box, but I would assume there was grain in there because when you pour wheat into a ship or any bulk grain cargo they have a certain amount of it that you can see. There is evidence of it. They shoot it in and some of it slips out through cracks and spills and things like that.

Q. That is out through cracks in the box itself, you mean?

A. No, the box itself is practically all instances quite tight, but when they load the ship the chute that pours it has a certain drive to it and it flies around because when you pour ships you don't—it is quite a bit of a job, it is a dusty operation and you can't always see and you hit it and it kind of flares up and goes over the tops, sometimes.

Q. Is the box constructed of wood?

A. The boxes are constructed of wood and the cracks inside the feeder box are generally lined with burlap or paper to prevent the drying out of the wood as the ship is in transit and the wheat coming out all over.

(Testimony of Shaun Maloney.)

Q. Did you continue working the balance of that ship? A. Yes, I did.

Q. Was Dr. Smith the first doctor that you went to? A. Yes.

Q. And you went to him because you were sent by the stevedore company? [32]

A. I was sent to him by the Grace Company who are agents for the John Line of Sweden, the owners of the ship.

Q. The Grace Company. Do you know if they were doing the stevedoring?

A. I don't know whether W. R. Grace or Grace Line. There are two companies. It was Grace that sent me to Dr. Smith.

The Court: Dr. Smith?

The Witness: Dr. Smith, your Honor.

Q. And aside from your working for the Waterfront Employers, which is normal on the waterfront, the stevedoring company which was actually doing the job was that W. R. Grace, if you know?

A. I think it was W. R. Grace.

Q. How many times did you go back to Dr. Smith for examination or treatment?

A. When I first went to Dr. Smith he took some X-rays and told me I had suffered a sprain and that it would eliminate itself. It would be painful but he saw no reason why I should stop working and he told me that I should come to his office two or three times a week for physical therapy treatments and between June 28th and December 28th or 29th, about that time, I had been to his office on several oc-

(Testimony of Shaun Maloney.)

casions, sometimes two and three times a week, and he has taken several X-rays in the period between June and the latter part of December, of my hand.

Q. During that period did you go to any other doctor? A. No. sir. [33]

Q. Then on December 28th, Dr. Gray told us you went up to see him. A. I did.

Q. Who was the next doctor that you saw after Dr. Gray?

A. I went to Dr. Dirstine, Morris Dirstine.

Q. And did you go to him on your own or did somebody send you?

A. No. About December 28th I finally couldn't stand the pain of the arm any more, working and I went to Dr. Smith and he told me——

Q. Just a moment. We can't tell what other people said. My question was, how did you happen to go to Dr. Dirstine, did you go on your own?

A. I wanted a choice——

Q. The question is, did you go on your own or did somebody send you?

A. The insurance company, the carrier carrying the insurance sent me.

Q. For the longshoremen? A. Yes.

Q. He was the next doctor you went to?

A. Yes sir.

Q. What other doctors have you been to other than the ones you have mentioned?

A. I went to Dr. Gray, to Dr. Smith and to Dr. Seering.

Q. When did you go to Dr. Seering?

(Testimony of Shaun Maloney.)

A. That was last—I think January, sometime.

Q. Of 1955? A. 1955.

Q. And did you go on your own or did somebody send you? [34]

A. I went to Dr. Seering on my own.

Q. Did he treat you or just examine you?

A. He examined me.

Q. Did you go just the one time to him?

A. I think I was there twice.

Q. And both for examination only?

A. Well, once I think I went up for observation. He made an examination one time. I also went to Dr. McConville.

Q. That was at our request?

A. At the request of Bogle, Bogle & Gates, and the insurance company.

Q. Any other doctor you have been to?

A. No sir.

Q. When you told us, Mr. Maloney, that you have lost about 184 days. What period is that? Is that from the time of the accident up to today?

A. That is the time of the accident up until today.

Q. Do you have available there your earnings for the various years? A. I do.

Q. Could you tell us what your earnings were for 1953? A. I could consult a slip I have.

Q. You have your own notes that you keep?

A. I made some, yes.

Q. Could you tell us what 1953 was?

(Testimony of Shaun Maloney.)

A. In the year 1953, I made a total sum of $4,663.28.

Q. Do you have the records for 1952?

A. I do.

Q. What was that? A. $2,383.32. [35]

Q. And in 1954?

A. 1954, I made $2,988.32.

The Court: Let me have that figure again?

The Witness: 1954, $2,988.32.

Q. Was there any time during 1954 that you were off work because of physical trouble other than your hand? A. Yes.

Q. And how long were you off work for that reason?

A. I injured my ankle, I sprained my ankle September 18, 1954, and I returned to work, I believe, December 6, 1954.

The Court: Those dates again?

The Witness: September 18, 1954, I think that was the date, and I returned December 6, 1954.

Q. Do you have your earnings to date for 1955?

A. Not to date, I have approximate.

Q. What is that?

A. I will have to give it to you in two groups. We were furnished with a report of our earnings on this only by hours. On the 13th of June I had worked a total of 437 straight-time hours and 382 overtime hours. That is a total of 819 hours and to the best of my knowledge, I would say I have worked about 160 hours in addition to that, about one thousand hours.

(Testimony of Shaun Maloney.)

Q. Could you just give us a rough estimate of how much money you have earned?

A. I would make an estimate that that would run between $2,700 and $2,800 for a total of approximately one [36] thousand hours. Maybe a little more.

Q. Up to today? A. Up to today.

Q. Were you off work at any time this year because of any reason at all other than what you might have told us about your hand?

A. Yes. One day a rail, a stanchion rolled on my foot and I lost six or seven days on that account.

Q. Any other period of lost time from work?

A. No, I don't think so.

Q. In computing the days that you gave us as being those that you have lost since the time of your injury, how did you determine what days you might have worked if you had not had your hand injury. In other words, what work was available to you? How do you figure that out?

A. The way I determined I was unable to work on account of the injury is when I was on a job and when I finished it or had to check out I was unable to continue work for a few days or a day or two or three, or whatever the case may be, because of the soreness and stiffness in my wrist and in my arm.

Q. Was any part of that 184 days that you listed also part of the time you were off because of your ankle injury?

A. No, none of that time is computed. Only the

(Testimony of Shaun Maloney.)

days I was actually—that I determined I was laid up as a result of my wrist.

Mr. Holland: I have no further questions. [37]

Redirect Examination

By Mr. Poth:

Q. How much did you say you made in 1952?

A. $2,383.32.

Q. What was you employment in 1952?

A. In 1952 I was not a fully registered longshoreman.

Q. What do you mean by a fully registered longshoreman?

A. Well, they have in this port an agreement by all the employers on how many men are to be registered fully. They have others who are agreed upon as to being partially registered men.

Q. This board you mentioned you are on where you put your plug in and it goes in rotation. What kind of men are on that board?

A. Those are all the fully registered longshoremen on the basis of seniority.

Q. Were you on that board in '52?

A. I was not. I was on the temporary board that they have, the temporary labor pool board.

Q. You took the work left over after those men went to work? A. Yes.

Q. Was your job opportunity as good in '52 and in '53? A. No sir.

Q. Why was that?

A. Well, first, the regular longshoremen get the

(Testimony of Shaun Maloney.)

first—the fully registered men on the basis of seniority get the first chance at the job. Any work left over comes to the temporary pool or the partially registered men. [38]

Q. How do you get on that registered board?

A. By the basis of seniority in the industry.

Q. When did you get on the fully registered board? A. In April of 1953.

Mr. Poth: I have no further questions.

Mr. Holland: I have no further questions.

(Witness Excused.)

The Court: We will take our recess now until 2 o'clock this afternoon.

(Recess taken.)

Afternoon Session

August 3, 1955—2:00 P.M.

The court reconvened, pursuant to adjournment, at 2:00 p.m. this date. All parties present.

Mr. Poth: The plaintiff will rest at this time, your Honor.

(Challenge as to the sufficiency of the evidence made by the defendant.)

The Court: The motion is denied.

WILLIAM DIBBLE

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Holland:

Q. Would you state your name? [39]

A. William Dibble.

Q. Where do you live? A. Seattle.

Q. What is your occupation?

A. Supercargo.

Q. Mr. Dibble, what is a supercargo?

A. A supercargo supervises the loading and/or discharging of ships.

Q. And for whom does the supercargo normally do that work? A. For the ship or agents.

Q. Mr. Dibble, did you ever do any work aboard the Golden State?

A. Not the Golden State.

The Golden Gate. A. Yes, sir.

Q. The subject of this lawsuit is an incident that occurred on June 28, 1953. Would you state whether or not you were aboard her in any capacity on that date? A. I was supercargo on that date.

Q. And just generally what do you do aboard the vessel as you were doing your work as a supercargo?

A. I don't know just what you mean by that.

Q. What do you do when you are on the ship? What does your job require you to do?

A. Usually give instructions to the foreman and then I look around and see that things are done as it should be.

(Testimony of William Dibble.)

Q. Will you state whether or not on that date any [40] complaint was ever made to you that the 'tween deck level of the Number 7 hatch on the vessel was dirty, or covered with grain or wheat?

A. No, sir.

Q. And would you state whether or not in your recollection you have any memory of any work being done in the 'tween deck level of Number 7 hatch of cleaning up any debris or wheat or anything?

A. Not in Seattle.

Q. Do you have any recollection of looking down in that particular hatch when you were on the Golden Gate? A. No, sir.

Q. Have you been on other vessels, Mr. Dibble, on which wheat was a part of the cargo?

A. Yes, sir.

Q. And have you observed other vessels in which there have been a feeder box between decks?

A. Yes.

Q. Assuming, Mr. Dibble, that the lower hold was full of wheat and the feeder box in the 'tween deck level was full of wheat, what have you in your experience observed as to the presence or absence of any wheat in the vicinity of the feeder box after the vessel has been loaded with its cargo?

A. Well, there is always a certain amount that spills over, of course, when they are pouring the wheat. They clean up the decks as best they can and all of the wheat is put into the hold where it is supposed to be. Occasionally there is a little wheat slops over, gets on the decks. [41]

(Testimony of William Dibble.)

Q. You told us in answer to my question that you had not observed any cleaning of the deck in Seattle. Did you imply by that you had seen some elsewhere?

A. Yes, they cleaned up in Tacoma where they loaded it. That is part of the longshoreman's work to clean up the deck and throw what wheat slops over back.

Q. Were you supercargo on the vessel for that Tacoma job? A. Yes, sir.

Mr. Holland: I have no further questions.

Cross-Examination

By Mr. Poth:

Q. Did you see anybody cleaning the deck in the Number 7 hold in Tacoma?

A. I don't recollect right now.

In other words then, you are just testifying that you think maybe they did clean it.

A. That is the standard procedure. I know they cleaned it, but I don't recollect actually seeing them do it.

Q. You don't know how well it was cleaned?

A. No, sir.

Q. Tacoma would be the port where the wheat was loaded prior to the time the vessel came here to Seattle on June 28, 1953? A. Yes, sir.

Q. And you also don't recall much about the Number 7 hold when it was in Seattle, do you?

A. No, sir.

Q. You don't even remember ever looking down

(Testimony of William Dibble.)

there, do you? [42] A. Not particularly.

Mr. Poth: I have no further questions.

Redirect Examination

By Mr. Holland:

Mr. Dibble, when you stated that in connection with the loading in Tacoma, the cleaning in Tacoma you did not actually see it being done. How can you conclude that it had been done?

A. That is the standard practice and the foremen are instructed to see that that work is done. I may have looked at it, but I don't recollect that I did. There is nothing special that I should remember.

Q. Were you on the vessel in Tacoma?

A. Yes, sir.

Mr. Holland: No further questions.

Mr. Poth: I have nothing further.

(Witness Excused.)

Mr. Holland: Mr. Patterson.

WILLIAM PATTERSON

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Holland:

Q. Would you state your name?

A. William Patterson.

Q. What is your occupation?

(Testimony of William Patterson.)

A. I am stevedore foreman.

Q. Where do you live? [43]

A. 2930 South 18th, Tacoma, Washington.

Q. As a stevedore foreman by whom are you normally employed? A. Grace Line Steamship.

Q. Were you present at any time aboard the vessel Golden Gate on June 28, 1953? A. Yes.

Q. What was your job aboard her?

A. I was head foreman.

The Court: I would like to ask a question at this point. The gentleman testified he was employed by Grace Line Steamship. Is that the same company mentioned in paragraph IV of the complaint, the W. R. Grace Company?

The Witness: They are agents for them.

The Court: The point is, if there is any variance I want to know if there is going to be any point made of it.

Mr. Holland: Perhaps I could explain and counsel can correct me if I am not correct. I think W. R. Grace & Company does stevedoring operation and they were the stevedoring contractor for this particular job and were in effect the plaintiff's employer. I think at the same time they also act in another capacity as local agent for the Johnson Line, which is a foreign corporation and therefore acted as agent and stevedoring contractor.

The Court: If there was technically any variance, you make no point of that.

Mr. Holland: There is no point of that, [44] your Honor.

(Testimony of William Patterson.)

Q. As stevedore foreman, Mr. Patterson, just generally what are your duties on a job such as you were doing that day?

A. In charge of all loading and discharging operations.

Q. Do you recall having heard of an accident to Mr. Shaun Maloney aboard the vessel on that date?

A. Yes, he reported to me on that date he slipped and fell.

Q. Will you state whether or not at the time he reported to you it was done in the normal course of your longshoreman's business of reporting accidents?

A. Yes. I am hazy on the time. I believe it was around lunch time or right after that. I wouldn't want to get down and state right exactly, but that is my recollection.

Q. As stevedore foreman, were you his superior officer, so to speak? A. Yes.

Q. Would you tell us whether or not at the time of his reporting his accident to you he made any complaint about the condition of the 'tween deck in the Number 7 hatch?

A. Well, I am kind of hazy on that, it is two years back, and I am not too positively sure. He did report the accident to me. I believe he said he slipped. I think he said there might have been wheat. I don't remember exactly what he fell on.

Q. Do you recall anybody else making complaints about the condition of that area of the ship? [45]

(Testimony of William Patterson.)

A. No, I don't.

Q. Do you recall having ordered or having observed any cleaning up of the 'tween deck of the Number 7 hatch?

A. No, I don't remember that.

Q. In the normal course of a stevedore or longshoreman's work, Mr. Patterson, what is done by a longshore gang if they come to an area which in their opinion is dirty and should be cleaned up for their work? A. Should be cleaned up.

Q. Who does that?

A. The longshoreman as a rule if it is only a small operation. If it is a big, major operation, then the crew of the ship would probably do it.

Q. Tell whether or not you observed any of the ships crew cleaning that up?

A. No, that particular time I was engaged in unloading heavy lift tanks on another hatch and I was practically engaged there on that particular hatch all the time.

Mr. Holland: I have no further questions.

Cross-Examination

By Mr. Poth:

Q. Who normally is charged in your experience with the duty of keeping the decks of a vessel clean? Your company or the ship?

A. The ship's personnel keeps their decks clear, as a rule.

Mr. Poth: I have no further questions.

(Witness Excused.) [46]

Mr. Holland: Defendant wishes to publish the deposition of Dr. M. J. Dirstine.

(Deposition of Dr. M. J. Dirstine, taken July 12, 1955, at Seattle, Washington, at the instance of the defendant, was opened, published and read as follows):

"DR. M. J. DIRSTINE

a witness called on behalf of the defendant, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Franklin:

Q. Would you state your name, please?

A. M. J. Dirstine.

Q. You are a duly licensed practicing physician in the State of Washington, Doctor?

A. That is right.

Q. Of what medical school are you a graduate?

A. Northwestern.

Q. When did you graduate? A. 1937.

Q. Would you briefly sketch your professional career following graduation?

A. I had an internship and surgical residency and pathologic residency.

Q. Do you specialize in any particular field, Doctor?

A. Well, my practice is limited to surgery of the hand.

Q. How long have you limited yourself to that

(Deposition of Dr. M. J. Dirstine.)

specialty? A. Let's see, for about ten years.

Q. And what scientific societies are you a member of, [47] Doctor?

A. King County, Washington State Medical, Seattle Surgical, American Medical Association, American College of Surgeons, American Society for Surgery of the Hand. That is enough.

Q. Doctor, will you be in Seattle the week of August 2, 1955, when the case of Maloney verson Johnson Line comes on for trial?

A. I don't plan on it.

Q. You expect to be out of town? A. Yes.

Q. And you therefore waive signing your deposition? A. Yes.

Q. Have you ever had occasion to treat the plaintiff in this action, Mr. Shaun Maloney?

A. The only treatment I have done or suggested has been that I recommended two or three X-ray treatments which was done by a radiologist.

Q. When did you first see Mr. Shaun Maloney, Doctor? A. On the 11th of January, 1954.

Q. And at that time, Doctor, did you see him in connection with an injury he had sustained earlier?

A. Yes, he stated that he was injured in June, 1953.

Q. And briefly, what was the nature of the injury he told you he sustained?

A. He was working on the Steamship Golden Gate at a Seattle dock and he slipped on the deck and fell on his right hand and fingers.

Q. Was he making any complaints to you on

(Deposition of Dr. M. J. Dirstine.)

January 11, 1954, in connection with that injury when you first saw him? [48]

A. His complaint then was pain in the dorsal surface of the right wrist when doing heavy work. He also stated that after doing heavy work he gets a lump on the back of the right wrist.

Q. Is there a medical or technical name for this lump he described, Doctor?

A. Well, after watching him——

Q. No, I mean generally is there a medical description for the lump?

A. A tumor.

Q. Do you call it a ganglion?

A. Yes, that is a tumor.

Q. Doctor, at the time that you first examined Mr. Maloney on January 11, 1954, did you make a physical examination of his right wrist?

A. Yes—well, right upper extremity.

Q. What did that show with reference to the presence or absence of any unusual condition?

A. Well, at that time he complained of discomfort in the wrist but there was no swelling of the hand or wrist at that time and he had complete range of all motions of the wrist and fingers and there was no evidence of any nerve changes. In fact, objectively there wasn't any findings.

Q. What did you do, Doctor, in connection with treating Mr. Maloney?

A. I think at that time I recommended if there was any possibility of a ganglion, although objec-

(Deposition of Dr. M. J. Dirstine.)

tively and clinically there wasn't any evidence of one, that he should have X-ray therapy. That occasionally helps [49] a patient like this. Also that the wrist should be immobilized in a splint.

Q. When did you next see Mr. Maloney?

A. The 22nd of January.

Q. What was his condition at that time?

A. It was about the same, but he still had the same complaints as far as I recall and at that time we ordered X-ray therapy.

Q. When did you next see him?

A. On the 27th.

Q. Of January? A. That is right.

Q. What was his condition at that time and what did you do for him?

A. At that time when he came in we had ordered his splint and he had the splint and he had had his X-ray therapy and he still complained of some soreness in the wrist, although there was no objective findings at that time, either, and at that time we gave him a prescription for cortone which sometimes helps complaints of discomfort in the wrist.

Q. Either on January 22 or January 27 was there any evidence of any tumor formation present in the right wrist?

A. I have no mention of any tumor at all here.

Q. When did you next see Mr. Maloney?

A. On the 3rd of February, 1954.

Q. With what results?

A. He then said he had much less discomfort in the wrist and there was very little, if any, swelling that I [50] could see. He was wearing a splint. I

(Deposition of Dr. M. J. Dirstine.)

told him to continue wearing that splint and come back in about another week and we would see how he was doing.

Q. Did he make any comments as to whether or not he had made any progress?

A. The only comments, he told me he had less discomfort.

Q. When did you next see him?

A. On the 15th of February, 1954.

Q. What was his condition at that time?

A. At that time examination revealed no swelling of his wrist but he stated that he was chopping wood and he thought the wrist was a little bit sore and I asked him then to leave the immobilizing splint on for awhile, and at that time he had no evidence of any tumor. He also said he had no discomfort—no, I told him if he had no discomfort then he should return to work.

Q. When did you next see him, Doctor?

A. On the 19th of February.

Q. What was his condition at that time—that is 1954? That is right.

Q. What was his condition at that time?

A. At that time there was still no evidence of any swelling in the wrist and there was no evidence of a ganglion or tumor.

Q. Was he still wearing the splint?

A. Yes, he was wearing the splint, and will return to work on the 23rd of February.

Q. 1954? A. 1954. [51]

Q. When did you next see him, Doctor?

(Deposition of Dr. M. J. Dirstine.)

A. I told him to go to work and try it and come back in two weeks and I saw him on the 2nd of March.

Q. What was his condition on March 2, 1954?

A. He still had no evidence of a ganglion but he still complained of a little soreness in the wrist and he had been wearing this splint intermittently and has returned to work. I asked him to report back if he had any further trouble.

Q. When did you next see him, Doctor?

A. I don't know if I did see him—at that time I sent his report to Mr. Poth on the 2nd of March summarizing the whole thing, and I sent another letter on the 23rd of April and in the letter on the 23rd of April it was just a resume of the examination of the time I saw him on the 2nd of March at which time there was no evidence of any ganglion. He still stated he had some soreness in this area although not as marked as previously. He is working and wearing a splint intermittently.

Q. When did you next see him, Doctor?

A. On the 21st of August, 1954—no, a correction on that, I saw him on the 17th of August and I sent this letter on the 21st of August and he still stated he has some discomfort in the wrist especially on hyper-extending it and lifting objects over his head. He has been wearing the splint intermittently and he has been able to carry on his occupation but with some discomfort. This patient still has no evidence of tumor formation. He has complete range of all motions of the wrist although he states after heavy

(Deposition of Dr. M. J. Dirstine.)

work it [52] becomes sore and he cannot completely extend it.

Q. And then when did you next see him?

A. That is the last time, I think.

Q. I beg your pardon?

A. Let's see—wait a minute. This patient was in this office on the 30th of September, 1954, at which time he stated he had been off work since the 18th of September because of an ankle injury and since he has not been working he has had no discomfort in the wrist. Examination at that time revealed complete range of all motions of the wrist and no evidence of tumor formation and no swelling, no evidence of inflammatory reaction.

Q. Doctor, based on your examination of September 30, 1954, was there any objective evidence that Mr. Maloney had sustained any permanent disability as a result of his accident of June 28, 1953?

A. Well, I could see no objective findings nor any disability. He had no swelling, no tumor formation. He had good range of motion, no inflammatory reaction, and the overall picture, his hand and wrist looked normal.

Q. Doctor, taking into consideration Mr. Maloney's injury occurred June 28, 1953, if a tumor were to have resulted from that injury what is your professional opinion as to when it would reasonably be expected to appear or manifest itself following that injury of June 28th, 1953?

A. Well, I am not sure that the tumor we are speaking of, the ganglion, is due to injury. [53]

(Deposition of Dr. M. J. Dirstine.)

Q. No, just for the sake of discussion assume that the ganglion were due to an injury, if the injury occurred to Mr. Maloney on June 28th, 1953, when would you reasonably expect it to appear following the injury?

A. Well, those we see that have ganglions, most frequently they would say they fell or had an injury maybe two weeks ago or four weeks ago or something like that. They all vary. Quite frequently—I presume more frequently—they have these tumors and they have no history of injury. They just came.

Q. Doctor, is the cause of tumors in the wrist such as we have been discussing known?

A. No.

Mr. Franklin: That is all, thank you, Doctor

Cross-Examination

By Mr. Poth:

Q. Let's see, Doctor, you were employed by the carrier here to treat Mr. Maloney?

A. I think that he was sent in by Travelers Insurance Company.

Q. Have you discussed this case with Mr. Franklin prior to today? A. No, not that I know of.

Q. Have you discussed this case with anyone from Mr. Franklin's office, the firm of Bogle, Bogle & Gates?

A. Not that I know of, no—not that I recall.

Q. Well, have you discussed the case with anyone? A. No, not that I know of, no. [54]

(Deposition of Dr. M. J. Dirstine.)

Q. To whom have you sent communications regarding this case?

A. I think all of these have gone to Mr. Poth and to Travelers Insurance Company.

Q. Doctor, why did you give him the X-ray treatments?

A. Because sometimes some doctors have the idea that X-ray will help some of them or make them recede. That has been tried quite some time and I have tried it.

Q. To make what recede?

A. Any tumor that may be there.

Q. Was there a tumor there?

A. I never saw a tumor there.

Q. Why did you give him the X-ray treatments?

A. Because occasionally I would presume that these tumors could be present and not clinically evident—be small enough—because that was always his story, that he had a tumor there and he had seen a tumor or enlargement.

Q. Do those tumors come and go?

A. That is what I understand.

Q. You are not too familiar with them, Doctor?

A. What do you mean, "too familiar"?

Q. Well, you say that is what you understand. Do you know whether or not they come and go from your own personal experience?

A. Well, all we have to go on is the history and patients will tell you, " I have one on this wrist now and I had one over here three years ago and it [55] is gone."

(Deposition of Dr. M. J. Dirstine.)

Q. Is trauma a factor in the formation of ganglion and tumors? A. No one knows?

Q. No one knows? A. No one.

Q. Doctor, I have in my hand a book from your library which is entitled, "Surgery of the Hand," by Bunnell and I believe it was copyrighted in 1948 by J. Lippincott & Company. Have you read your book? A. I think I have.

Q. Now, referring to page 866 under the section, "Tumors of the hand," and under the subsection entitled "Ganglia," and referring again to page 866 I wonder if you could read into the record, Doctor, that paragraph right here.

A. One or two lines here it states, "In most reported series trauma appears to be a factor in from one-third to one-half of the cases."

Q. When it says that, "series" what is meant by that term?

A. That is a very vague term. Some doctor has reported on these ganglia. Presumably he may have had two cases in his series. He may have had ten or he may have had 20.

Q. In other words then, "series" means reports of series of cases by individual doctors, is that right, is that the definition of "series"?

A. I presume so.

Q. Well, are you sure, Doctor?

A. Well, like I stated, a series, he is reporting on a [56] series of anything.

Q. In this paragraph are they referring to a

(Deposition of Dr. M. J. Dirstine.)

series of ganglion tumors that they have in their practice?

A. I presume so, yes, because it is under the heading of "ganglia."

Q. Well, I would like to be sure. Would you read it over and be sure? A. Read over what?

Q. Read this and be sure the series referred to is reports of series of cases of ganglion tumors.

Mr. Franklin: If the doctor can answer what the doctor had in mind—if he is a mind reader.

A. In this paragraph it doesn't state a series of what.

Q. Well, what series is being referred to?

A. That depends on what your interpretation is.

Q. Well, what is your interpretation, Doctor?

A. I would presume it would be under ganglia because it is under the subhead of ganglia.

Q. In other words, it wouldn't be a series of broken legs they are talking about?

A. Well, I wouldn't presume so.

Q. Well, isn't it a fact, Doctor, that this paragraph refers to a series of studies reported on cases by various specialists in the field of ganglion tumors? A. Not necessarily.

Q. What does it refer to?

A. It doesn't say anything about the series referring to any group of specialists in the field.

Q. Well, just tell what "reported series" means here, to [57] the best of your ability?

Mr. Franklin: The doctor has already told you what it is.

(Deposition of Dr. M. J. Dirstine.)

A. I just said it could be a series I would presume, since it is under the subhead of "ganglia" that it was a series of ganglia, but the series could be two, three, four, ten or 20. Also you asked if the series reported by specialists——

Q. Well, "reported series"—what do you think the author is referring to when he says "reported series"? A. I do not know.

Q. Well, Doctor, would you assume that this would be a reported series of cases that have come to the attention of physicians and surgeons who have made reports on the findings in their cases of ganglion tumors—would that be the natural assumption here, Doctor?

A. It is probably reports that have been gleaned from the literature of doctors who have made some reports on their experience with ganglia.

Q. All right, and this author says in your book that from one-third to one-half of the cases trauma appears to be a factor.

A. That is what it states there.

Q. Is that your opinion? A. No.

Q. What is your opinion, Doctor?

A. That is his opinion. That is not my opinion.

Q. You have a different opinion then than your book? A. That is right.

Q. What is your opinion, Doctor? [58]

A. I don't think trauma plays a part and in this patient here I don't think he has a ganglion.

Q. Well, we are discussing it generally, Doctor.

(Deposition of Dr. M. J. Dirstine.)

In what percentage does trauma play a part, in your opinion?

A. No one knows. I don't know. I think it is a very small percentage if at all.

Q. Who is Sterling Bunnell, M.D.?

A. A surgeon in San Francisco.

Q. Is he an honorary member of the American Academy of Orthopedic Surgeons, member of the American Surgical Association, American Association of Plastic Surgeons, American Society of Plastic Reconstructive Surgery, American Association of Surgery of Trauma, American Society for Surgery of the Hand, Consultant in Hand Surgery to the Surgeon General, Licentiate of the American Board of General Surgery and Plastic Surgery, Corresponding member of the British Orthopedic Association? A. I don't know.

Q. You don't know?

A. You are reading it there.

Q. Does that appear in your book?

A. I presume it does if you read it from the book.

Q. How did you happen to buy this book, Doctor? A. It is a good reference book.

Q. Do you use it quite often for reference?

A. Oh, I don't use it quite often.

Q. But you don't believe what is in it?

A. I didn't state that. [59]

Q. But you don't believe what is in it on ganglia? A. I didn't state that.

(Deposition of Dr. M. J. Dirstine.)

Q. You don't believe that trauma appears to be a factor in from one-third to one-half of the cases?

A. I would like to bring to your attention, if I may, on that thing, that you quoted Sterling Bunnell. Did Sterling Bunnell write this chapter on tumors of the hand?

Q. I don't know. Who did write it, Doctor?

A. No, he didn't. You better look at it.

Q. You tell us—you read it.

A. No, you tell us.

Q. What parts of this book did Bunnell write?

A. I do not know.

Q. I note this is written by a Dr. L. D. Howard, Jr., M.D.? A. That is right.

Q. Who is he, Doctor?

A. A doctor in San Francisco.

Q. Also where Bunnell is?

A. They are both in the same city.

Q. I note, Doctor, that there is a bibliography at the back of this chapter by Dr. L. D. Howard on tumors of the hand of which the section on ganglia is a part. Are you familiar with that bibliography back there?

A. Not necessarily familiar with it, no.

Q. Are you generally familiar?

A. I have a pretty good idea who those reports are taken from.

Q. What is the purpose of a bibliography in a work like [60] this?

A. To show you the people that the doctor had referred to when publishing it.

(Deposition of Dr. M. J. Dirstine.)

Q. When he would be talking about reported series would he be taking it from that bibliography?

A. No.

Q. From the works cited in the bibliography?

A. He could be—not necessarily.

Q. Well, now, under "bibliography" we first have L. Carp and A. P. Stout. Are you familiar with them? A. No.

Q. Entitled, "Study of Ganglia with Special reference to Treatment with References from 1746 to 1928;" and then we have DeOrsay, P. M. McRay, and L. K. Ferguson, "Pathology and Treatment of Ganglion, American Journal of Surgery, 36, 313 to 319, April, 1937." Are you familiar with that work?

A. Just generally, yes.

Q. Have you read it?

A. That has nothing to do with the cause. What that is, what you are talking about, primarily that has only to do with the treatment of it.

Q. Pathology and treatment?

A. That is right.

Q. What in included under the general term "Pathology"?

A. Pathology is not the etiology. Pathology is the cell structure and so forth.

Q. Now, Caplan—E. B. Caplan, "Treatment of Ganglion by Injection of Sodium Morrhuate, American Journal of Surgery, 34151, April, 1934." Are you familiar with [61] that work?

A. I know Caplan but does he say anything about the etiology, the cause of it?

(Deposition of Dr. M. J. Dirstine.)

Q. I don't know. Have you read the work?

A. I know the man.

Q. Did he say anything in there about etiology?

A. Not that I recall. I don't think anyone will tell you that.

Q. Except the doctor that wrote this chapter.

A. He does not say specifically the cause, either.

Q. Now, we have E. S. J. King, "The Pathology of Ganglia," Australia and New Zealand Journal of Surgery, 1367-381 March, 1932. Are you familiar with that work?

A. I have covered most of that at one time or another.

Q. Now, we have F. M. Lyle, "Radiation Treatment of Ganglion of the Wrist and Hand," Journal of Bone and Joint Surgery, 26 162-163, January, 1941. Do you know Dr. Lyle?

A. I am familiar with that article.

Q. Did you follow this article in giving Mr. Maloney radiation treatment?

A. That is right, that was one of the suggestions, yes, there was a possibility of helping if they do have a ganglion.

Q. But you say he didn't have a ganglion.

A. I have never seen one, no.

Q. But you gave him the radiation treatment anyway? A. The possibility, yes.

Q. You also gave him cortisone, did you not, Doctor? A. Yes.

Q. Why did you give him cortisone? [62]

(Deposition of Dr. M. J. Dirstine.)

A. Because cortisone has relieved discomfort in the wrist.

Q. Discomfort from what?

A. From anything.

Q. Is that a treatment also for ganglia?

A. It has been tried. There is no specific treatment. Several things have been tried.

Q. How long did you have him wear this splint, Doctor?

A. Oh, I don't know exactly how long. He wore it intermittently when he was working. How long he wore it around home I don't know. I have no way of knowing.

Q. Do you know whether or not an operation was at any time considered upon Mr. Maloney's wrist? A. Not by me.

Q. Who was an operation considered by, Doctor? A. I don't know.

Q. Do you have any reports there, Doctor?

A. No, sir.

Q. What is that you have been reporting from, Doctor? A. My office calls here.

Q. I would like to see it, Doctor. What is a tenosynovitis, Doctor?

A. Inflammatory irritation around the tendon.

Q. What is the fourth dorsal osteofibrous canal?

A. That is the canal on the back of the wrist through which the extensor tendons to the second, third and fourth digits pass.

Q. Has that got anything to do with the fourth dorsal vertebra? A. No.

(Deposition of Dr. M. J. Dirstine.)

Q. How long did you keep him from work, Doctor.? [63] A. I don't know.

Q. Could you tell us?

A. I think he worked off and on at various times and I always encouraged him to go back to work if he could and to wear his splint, to wear it and go back to work. I had on the 3rd of February here that he should be able to return to work on the 15th of February.

Q. And when did you write that?

Mr. Franklin: What year, Doctor?

The Witness: 1954.

Q. And when did you write that?

A. February 3rd.

Q. February 3rd? A. That is right.

Q. Well, did you recommend that he work when he first came in to you—what date was that he first came in to you?

A. I believe the 22nd—let me see here when he was first in. He was first seen on the 11th of January.

Q. And when did you think he would be able to go to work at that time? A. I did not know.

Q. And you later decided on the 2nd of February that he should be able to go to work by the 15th? A. That is right.

Q. When did you put his hand in a splint?

A. This splint was ordered I think the 22nd of January and when I saw him on the 27th, five days later, he had the splint.

Q. As part of his history, Doctor, did you elicit

(Deposition of Dr. M. J. Dirstine.)

from [64] him any information to the effect that he had been treated by another doctor who wanted to operate on the wrist? A. Not that I recall.

Q. You would not say that he did not tell you that?

A. No, I don't know. I don't recall that he did.

Q. You don't remember anything about an operation, about you being called in to see whether an operation was necessary?

A. I don't think so. That is quite awhile ago but I don't recall. As far as I recall, the only thing I know about any other doctor is on this report when I first saw him on the 11th of January, that he was injured on the 28th of June and the following day he consulted Dr. Edmund Smith and X-rays were taken.

Q. Did you know he had been scheduled for operation on that wrist?

A. Not that I know of, no.

Q. If that was the fact and you were so informed it has since slipped your memory, is that right? A. I don't know.

Q. You don't know whether it slipped your memory or not?

A. I don't know whether he told me that or not.

Q. But you wouldn't say he did not have that information at that time?

A. Well, I don't think it would make any difference to me. If a man has a doctor and he wants to operate on something and the patient wants it operated that is his own business, not mine.

(Deposition of Dr. M. J. Dirstine.)

Q. And that opinion, Doctor, is without regard to whether [65] the operation is actually necessary or not? A. Well, I am not infallible, you know.

Mr. Poth: I believe I have no further questions.

Redirect Examination

By Mr. Franklin:

Q. Doctor, how many cases of ganglion cysts would you estimate you have treated or seen in your professional career—ganglion cysts of the wrist?

A. Oh, I don't know—several hundred.

Mr. Franklin: That is all, thank you, Doctor.

Mr. Poth: That is all.

(Deposition concluded.)''

Mr. Holland: I will call Mr. Ledyard.

RICHARD F. LEDYARD

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Holland:

Q. Would you state your name?

A. Richard F. Ledyard.

Q. What is your occupation?

A. Presently you mean?

Q. Yes.

A. President of the Commercial Statistical Service Company. [66]

(Testimony of Richard F. Ledyard.)

Q. What type of work is that?

A. A service bureau using a punch card system of accounting.

Q. How long have you been with that company, Mr. Ledyard? A. Since June 1, 1955.

Q. Prior to that time what was your occupation?

A. I was office manager of the Waterfront Employers of Washington.

Q. And the Waterfront Employers of Washington is what?

A. Well, it is an association of steamship companies, stevedore companies, dock companies.

Q. What, if anything, does that company have to do with the payments made to longshoremen?

A. They receive payrolls from the various waterfront employers and process and issue the paychecks, prepare quarterly social security returns and annual tax returns and keep earning records.

Q. Is that sort of a type of funneling of all earnings from the various companies through the one office and then to the longshoreman?

A. Yes.

Q. The object being so that they receive one check in their pay period? A. That is right.

Q. In connection with the wage records of the various longshoremen kept by your office, what was your job?

A. Well, I was in charge of that particular department.

Q. In connection with a record of the wages of a Mr. Shaun Maloney were you asked by a member

(Testimony of Richard F. Ledyard.)

of the firm of Bogle, Bogle & Gates to prepare a graph [67] reflecting his earnings during a certain period? A. Yes, I was.

Q. By Mr. Potter, who is no longer in our office?

A. Yes.

Q. Did you prepare such a graph?

A. Yes, I did.

Q. In making the graph did you use the individual earning records as found in your office?

A. Yes.

Mr. Holland: May I have this marked?

(Defendant's Exhibit A-1 marked for identification.)

Q. Mr. Ledyard, handing you what has been marked Defendant's Exhibit A-1 for identification, without telling the contents, state briefly what this piece of paper is?

A. Well, it is a graph of the earnings of Shaun Maloney for the period January, 1951, through March of 1955.

Q. Is that the graph that you testified you prepared? A. Yes, sir.

Mr. Holland: We offer Defendant's Exhibit A-1 in evidence.

Mr. Poth: Well, I am too confused by what I see here to be able to make a proper objection.

Mr. Holland: I will have Mr. Ledyard explain the graph and then perhaps you can object, if you like.

Q. Mr. Ledyard, I will hold the graph for you

(Testimony of Richard F. Ledyard.)

and would you just explain what the coordinates of the graph [68] mean and how the graph is read?

A. Well, the left hand side indictes, I believe $25 breaks in wages. In other words, I start with zero, $25, $50, $75, $100.

Q. How high does that go?

A. $650. Across the bottom indicates the various months of the years '51, '52, '53, '54 and through March of '55.

Q. The months are indentified by what identification? A. Just initials.

Q. And the years are marked on the graph?

A. Yes, they are.

Mr. Poth: I can hardly see the purpose of the graph. He either made money or he didn't. To me it is not a matter of a picture, it is a matter of arithmetic. I think the wages he made are the best evidence themselves. I don't think this demonstrates wages, this demonstrates some trend like cycles or something. I don't follow it.

Mr. Holland: I might say, we believe this to be a graphic representation of the earning record as contained in the office of the Waterfront Employers and indicates the man's earnings before and after the accident.

We again offer Defendant's Exhibit A-1 in Evidence.

The Court: I am thinking of Section 1732, Title 28.

Mr. Holland: Business records. [69]

The Court: Records made in the regular course

(Testimony of Richard F. Ledyard.)

of business. But this is something else. It is a graph. Why couldn't we have the records here and photographic copies of them?

Mr. Holland: Let me ask the witness.

Q. (By Mr. Holland): How are the actual records set up in that office?

A. Well, the original record is a payroll form approximately seventeen inches wide and twelve inches deep.

Q. You mean individual sheets? A. Yes.

The Court: Couldn't a memorandum be taken from the records, rather than bring them in, or a summary of them, rather than something that is going to take a scientific mind to figure it out? I haven't seen the exhibit, but it seems to be confusing to counsel and if he is confused, I am kind of afraid I would be too.

Now, there are records somewhere at your command which will show the wages earned by this plaintiff during a period of time.

Mr. Holland: That is correct.

The Court: I am going to deny the document being admitted in evidence.

Mr. Holland: I might state that the earnings have been read off——

The Court: I will give you permission to introduce in evidence any document which would properly be admitted under Section 1732 of Title 28, [70] records made in the regular course of business, or photographic copies or any portion of

(Testimony of Richard F. Ledyard.)

the records, but I am not going to worry myself with anything of this kind or anything else.

The objection will be sustained to that document as not being evidence of a record made in the regular course of business as contemplated by section 1732 of Title 28, but counsel, it is understood the court will be glad to receive any testimony of any such record, if one is available, and I understand there is.

Mr. Holland: I might state, we believe the evidence is already in the case showing Mr. Maloney's earnings. He had a record and this is merely a graphic representation by month. We don't desire to put any more records in.

The Court: I didn't want it to appear I shut counsel out. If counsel wants evidence of any records in here I will be glad to receive them, but I don't think this is proper and I am not going to admit it.

Mr. Holland: That is all I have of this witness.

Mr. Poth: No questions.

Mr. Holland: Defendant rests.

Mr. Poth: We have no rebuttal, your honor.

The Court: I suppose you want to submit briefs, don't you?

Mr. Holland: I have, of course, [71] prepared and submitted a trial brief. Does your Honor have in mind making that comment a brief arguing the evidence?

The Court: Yes, arguing the whole case.

Mr. Holland: We are not used to that here

Normally we argue orally. But we will be glad to abide by your honor's wishes.

The Court: I would prefer to have that done.

Mr. Poth: I am very well prepared to submit a written argument, written brief.

The Court: Now, how about the transcript?

Mr. Holland: Well, in our practice here we do not have a transcript. We normally argue after the case.

The Court: I want a transcript in this case.

Mr. Holland: I see. Then when you asked us what about it——

The Court: Can you arrange for the expense of it?

Mr. Poth. I believe counsel and I can divide the cost.

Mr. Holland: Yes, that is agreeable.

The Court: Fine. So it will be understood the plaintiff has the opening and closing and you can argue the facts and the law in your brief and how much time would you like to have to [72] prepare and file your brief?

Mr. Poth: Two weeks, your honor?

The Court: Make it twenty days. Twenty days from the time you receive the transcript and then you want twenty days after receipt of his brief to reply?

Mr. Holland: I was thinking, I will be away the week of the 21st and the following week, and if Mr. Poth needed more time——

The Court: Yes, if counsel desire more time I will be glad to grant further time if it is necessary.

It will be understood you will have twenty, twenty and ten.

Mr. Poth: That is fine, your Honor.

The Court: And the time will start to run from the time the transcripts are furnished and counsel will arrange for the expense of the transcript.

(End of Proceedings.)

The following occurred on August 5, 1955, in chambers with both counsel present.

The Court: May we suggest a stipulation? Is that satisfactory?

Mr. Poth: Yes, your Honor.

Mr. Holland: Yes, your Honor.

The Court: The order sustaining the objection to the exhibit which was called a graph, defendant's A-1 is set aside and the exhibit is [73] set aside and the exhibit is admitted in evidence.

It is stipulated by and between counsel for the plaintiff and the defendant that at the time of the accident the plaintiff was of the age of forty-one years and it is further stipulated that the life expectancy of a male, Caucasian of the age of forty-one years, is 28.43 years.

Mr. Holland: That is correct.

Mr. Poth: Yes.

(End of Proceedings.)

[Endorsed]: Filed October 13, 1955. [74]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United State Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP I am transmitting herewith the following original documents in the file dealing with the above cause, excluding exhibits, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Complaint, filed April 2, 1954.
2. Summons with Marshal's return thereon, filed April 6, 1954.
3. Answer, filed April 12, 1954.
4. Deposition of Shaun M. Maloney, filed Nov. 19, 1954.
5. Motion Plaintiff for Trial Date, Dec. 28, 1954.
6. Note for Motion Docket, filed 12-28-54.
7. Praecipe, Plaintiff, for subpoenas, filed 3-7-55 (in blank).
8. Deposition of Dr. M. J. Dirstine, filed 7-29-55.

9. Trial Memorandum, filed Aug. 3, 1955.

10. Argument of Plaintiff, filed Sept. 7, 1955.

11. Argument of Defendant, filed Oct. 3, 1955.

12. Plaintiff's Reply to Defendant's Answer, filed Oct. 12, 1955.

13. Court Reporter's Transcript of Testimony, filed Oct. 13, 1955.

14. Opinion, Findings of Fact and Conclusions of Law, filed Feb. 23, 1956.

15. Motion Defendant for Reconsideration, filed March 9, 1956.

16. Motion Defendant for New Trial, filed 3-9-56.

17. Judgment for Plaintiff, filed 3-12-56.

18. Reply of Plaintiff to Defendant's Motion for New Trial, filed March 16, 1956.

19. Memorandum of Authorities on Defendant's Motion for New Trial, filed May 2, 1956.

20. Order on Denying Motion for New Trial, filed July 11, 1956.

21. Notice of Appeal, filed Aug. 3, 1956.

22. Cost Bond on Appeal, filed Aug. 3, 1956.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit:

Filing fee, Notice of Appeal, $5.00; and that said amount has been paid to me by the attorneys for appellant.

Witness my had and official seal at Seattle this 27th day of August, 1956.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 15244. United States Court of Appeals for the Ninth Circuit. Johnson Line, a Corporation, Appellant, vs. Shaun Maloney, Appellee. Transcript of Record, Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: August 29, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15244

JOHNSON LINE,

Appellant,

vs.

SHAUN MALONEY,

Appellee.

STATEMENT OF POINTS RELIED UPON AND DESIGNATION OF RECORD

Comes Now the defendant-appellant herein and pursuant to Rule 17 (6) of this Court sets forth the points on which it intends to rely as follows, to wit:

1. That the trial court committed reversible error in entering judgment for the plaintiff for the reason that there was no credible evidence or inferences from evidence from which the court could have concluded that the defendant had notice of the wheat upon which the plaintiff slipped or that the said wheat had existed on the deck a sufficient length of time to constitute constructive notice to the defendant and for the reason that in the absence of such evidence there is no liability on the part of the defendant.

2. That the trial court committed reversible error in that the damages awarded were excessive and were not supported by the evidence.

The appellant designates the entire record as necessary for the consideration of the appeal, excepting only the following:

1. Summons with Marshal's return thereon, filed April 6, 1954.

2. Deposition of Shaun Maloney, filed Nov. 19, 1954.

3. Motion, Plaintiff, for Trial Date, filed Dec. 28, 1954.

4. Note for Motion Docket, filed 12-28-54.

5. Praecipe, Plaintiff, for subpoenas, filed 3-7-55 (in blank).

BOGLE, BOGLE & GATES,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 24, 1956.